VICARIOUS LIABILITY

A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES

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PREFACE

THE present-day discussion of the question of the liability of Trade Unions is hampered by the constant and unwarranted implication that liability on the part of principals and employers for the wrongful acts of those who are employed by them is a sort of natural law.

The further attempt to incorporate loose associations of people who happen to be acting together, by treating them as liable for the wrongful acts of the most prominent of their number, turns on the same mistaken idea.

It has therefore been thought well to examine with some care the history and limits of the doctrine thus elevated to the pedestal of an axiom.

The result is to show that it is, on the contrary, a principle dubious in origin, and unjust in operation—one, moreover, which eminent judges have stated is certainly not to be extended, and for which little or no theoretical justification is even to be found advanced.

The society-member's asserted liability is only an illogical inference from that of shareholders; the shareholder's liability is only a variety of the liability of the partner; the partner's liability is only *qua* principal, and began in 1833; the principal's liability is only *qua* master;[1] and the master's liability is based on a tissue of misapprehensions and began in 1692.

It may be fancied that the views maintained in this volume are retrogressive, and fail to take account of the

[1] 'The liability of a principal for the acts, negligence, misfeasances, &c., of an agent is confined to those cases where the agent is a servant': Wright on Agency, p. 277. Pollock, Torts, p. 81.

great increase and importance of organizations of various kinds at the present day. But the importance and the variety of organizations is no greater than it was in the era of religious orders and town guilds. I do not for a moment deny the reality of organizations. I only assert that their existence has not as yet superseded the primary responsibility of natural human beings : and that their joys and sorrows, their rights and duties, are as yet not a matter of very keen interest to anybody, nor of any but a nebulous and undefined nature.

I have endeavoured to seize on the salient features of reported cases, leaving the reader to consult the sources for their details ; none of which can safely be disregarded, and which it would be impossible to print in full.

Decisions are criticized with a freedom that may appear excessive. But in the hurried conditions of modern life the Courts can never have opportunity for minute research and for prolonged experiments in the mental laboratory. The necessary time and opportunity for precise investigation is the privilege of those in a humbler sphere. They will not be grudged the freedom of stating with scientific candour what appears to them to be its results.

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CHAPTER I

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'QUI facit per alium facit per se.' 'Respondeat superior.' These are phrases which roll trippingly off the tongue. But are they more? Whatever they are, they are not arguments.

One may venture, not improperly, to characterize the modern doctrine of vicarious responsibility for the acts of others as a veritable upas-tree. Unknown to the classical jurisprudence of Rome, unfamiliar to the mediaeval jurisprudence of England, it has attained its luxuriant growth through carelessness and false analogy, and it cannot but operate to check enterprise and to penalize commerce. The extension of joint-stock enterprise with limited liability alone makes the consequences of the doctrine tolerable. One unjuridical institution is inelegantly cured by another. 'Two blacks' make a dirty grey: and the jurist sighs in vain for white.

Clearly, 'Qui facit per alium facit per se' is a simple untruth, except so far as it expresses the truism that one who deliberately carries out a design through the instrumentality of another is the active agent throughout. It certainly is not true that what your agents do you do yourself. Neither in law nor in morals are the unauthorized acts of employees attributable to the employer. 'Respondeat superior' is the maxim which has really done the mischief. It is here proposed to examine how.

The investigation of the topic has three branches: the position of Servants, Agents, and Co-adjutors. It is almost impossible to separate them in discussion: and

this root-idea is common to them all, that *A* is doing work in concert with *B*, whether on equal terms or on terms of subordination. In each case the persons concerned are carrying on an undertaking in common and in concert: and indeed, it is not quite easy to see why the employees in a business are not literally within the definition of partnership contained in the Partnership Act of 1890. They are engaged in 'carrying on a business in common [with the proprietor] with a view to [his] profit': and the Act is not very particular or specific as to whose profit it need be. At any rate, we are safe in assuming that servants, agents, and coadjutors such as partners, are engaged in carrying out a concerted plan, whether they have a greater or lesser share in determining the modes of its detailed execution.

Now we are familiar with the *brocard* attributed to one of the later and less credible post-glossators, that 'If two men are walking up the street, and one of them steals a pair of boots from a shop window, they are both equally guilty.' And it is true that the criminal law of England evinces a hatred of concerted action—the hate of terror. The penalties of conspiracy and maintenance are standing witness to this. But the law never carried its hate and its terror into the calm region of civil process until late in its history. Joint tort-feasors were jointly liable for what they all intended. But they were not liable in tort for what they did not intend: the extravagances of some of their number. Such a liability, if it exists to-day, must exist by artificial imitation of the liabilities which have been imposed on commercial partners. And these liabilities, in their turn, have, we hope to show, been imposed in imitation of those imposed on the employers of servants.

Dr. Holdsworth tells us of sporadic cases of responsibility, in very early times, for the acts of children (antici-

patory of the ruling of a learned county court judge, that the father of an infant who had damaged goods in play was liable in law for his offspring's sportfulness). And Professor Wigmore [1] cites some not very convincing authority to prove that, so far as civil liability was concerned, the master was recognized to be responsible until about the fifteenth century. He admits that criminally it was not so, and also that the demarcation between civil and criminal liability at that date is hard to draw. If such a civil liability had really existed, it could not have failed to have left deep traces in literature ; of which no vestige seems to be forthcoming.[2] But even Wigmore allows (though reluctantly) that by the sixteenth century any such civil liability for ' uncommanded ' wrongs had disappeared.[3] Several of the instances he quotes are clear authority that (if it ever existed) it had disappeared at least two centuries earlier. Frankpledge, of course, accounted for a good deal of liability in early times of the sort which would now create ' employers' liability '. But frankpledge was not limited to employers, and cannot be the parent of their specific obligation.

The earliest real trace of any broad principle that the employer is liable for the unauthorized acts of his employee perpetrated ' within the scope ', as the ironical phrase goes, ' of his employment ', appears to be found in the very late case of *Hern* v. *Nichols* (1709) 1 Salk. 289, decided by Lord Holt. This case is quoted by Evans as the earliest authority for the proposition in question. But it seems to fall very far short of it.

For what were the facts in *Hern* v. *Nichols* ? Simply

[1] 7 Harvard L. R. 315.

[2] In fact, a striking passage which he cites (p. 393) from K. Henry V (IV. i) directly contradicts it. Shakespeare wrote in the seventeenth century; but he would never have treated a new principle of law as a moral axiom.

[3] 7 Harv. L. R. 384.

these : that a merchant had entrusted goods (silk) to an agent abroad ; the agent sold them with an incidental fraud, representing them to be of different and superior quality. The purchaser brought an action of 'deceit', i. e. fraud. It was doubted whether it lay properly against the merchant. Holt C. J. decided—at nisi prius—that it did, and that the merchant was liable *civiliter* (though not *criminaliter*) : 'For, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser, than a stranger.'

We might be listening to the Lords in the case of *Brocklesby* v. *Temperance Permanent Building Society* [1895] A. C. 173.

'Surely the loss should rather fall upon one who has selected the agent to raise money for him . . . than upon those who, finding him in possession of the deeds with authority in fact to borrow, had no knowledge of the limitation of the amount which he was authorized to raise' (*per* Herschell C.). 'It appears to me to be just and reasonable that, the agent having the control of the securities, for the purpose of borrowing . . . a lender who has no notice to the contrary should be entitled to deal with him on the footing that he had authority to pledge the securities to the full amount of their value' (*per* Watson L. A.).

Substitute 'silk' for 'deeds' and 'securities', and 'sale' for 'borrowing', and we have a case closely approaching *Hern* v. *Nichols*.

It was decided expressly on the ground of confidence. Two persons had reposed confidence in the factor—the seller and the buyer. Just so, in *Brocklesby*, two persons had reposed confidence in the agent—the borrower and the lender. Inevitably, the consequences of his unconscientiousness fell on that deceived person who had invited the confidence of the other. Holt's language in *Hern* v. *Nichols* might lead a superficial reader to conclude

that only the principal had reposed 'trust and confidence' in the agent—of course the buyer must have done so, otherwise the gist of the action of deceit would be gone. The fraud must not only have been meant to induce the contract, but must actually have induced it. The buyer must have reposed credit in the declarations of the agent. In what Holt says, stress must be laid on the word 'employs'. The principal employs the agent, trusts him, and induces other people to trust him.

'And there is no doubt but the verdict was right in that case,' says Chief Justice Lee, 'for the defendant employed his factor in the act of selling, in which the deceit was committed, and by employing him as a factor he created a credit in him' (*Hartop* v. *Hoare*, 3 Atk. at p. 47). If a merchant invites other people to repose confidence in, and to make contracts with, his agent, he cannot be surprised if he is called upon to justify that confidence and to fulfil those contracts.

But in a case of pure tort there is no antecedent confidence and nothing that can be construed as an invitation. The owner of a carriage does not invite the public to use the roads in reliance on the care and skill of his coachman.

Hern v. *Nichols* was a case not of an ordinary tort, but of an act inextricably bound up with contract.[1] Hern was sold inferior silk: it was inevitable that he should not be forced to pay the full price for it. Substantially the case was one of contract, and only in form was it one of tort.

[1] Lord Bramwell (in *Udell* v. *Atherton* (1861) 7 H. & N. p. 192) points this out, observing that *Hern* v. *Nichols* was really an action on a warranty: 'It is clear that was an action on a warranty, which was formerly called an action for deceit: and a good warranty was shown there, for it is said," the plaintiff bought the silk for —— silk and the defendant sold it to him for such, which it was not. It is true the factor had committed a fraud, but that did not make the case less one of warranty".'

The principle thus emerges that, alike in questions of contract and confidence, it is the individual relation between the principal and the third party, created by this invitation of confidence, which is the foundation of liability should it prove misplaced.

'You may accept his promises: you may place cash in his hands: you may rely on his statements,' says in effect the principal, 'and you may be assured that the promises will be performed, the cash properly applied, and the statements true.' The invitation may be tacit, and the very existence of the inviter unknown (as entirely as the trap-baiter is unknown to the mouse); but the invitation exists and he makes it, and is responsible for its consequences.

This explains the liability of innkeepers for the torts of their servants. Innkeepers invite the public to rely on the safety and honesty of their houses. The principle is analogous to the liability under which a landowner lies towards persons who visit it on his invitation.[1]

We have arrived, then, at this, so far as *Hern* v. *Nichols* is concerned—that a principal may well be supposed responsible for the acts of his agents towards third parties in a relation which he (through the agent or otherwise) has invited them to occupy.

Unfortunately, when the time came to put limits on the doctrine flowing from *Hern* v. *Nichols*, the limitation was not founded on the fact of a subsisting relation, invited by the principal, and carrying with it an invitation to trust the agent; but on that of the acts having been committed 'in the course of employment'.

[1] It has indeed been carried so far in a recent case (*Cox* v. *Coulson*, April 16, 1915), that a theatrical manager has been held to warrant the safety of his theatre. The defendant was cast in damages on account of the alleged negligence of an actor (*per* Bailhache J., *diss.* Shearman J., who was however prepared to hold the proprietor an insurer against anything dangerous intrinsically).

Unfortunately: because the whole sense of the rule is thus departed from. When an agent's employment is to make contracts, the principal knows that he will make contracts. He knows that he may make unprofitable contracts, stupid contracts—and he takes that risk. He knows that he will receive payments and may misapply them—and that risk, too, he takes. But he takes no incalculable risks. The risk of non-remittance may be great, but it is measurable. The risk of the contracts involving loss are measurable: they are limited by the common usage of business people. The risk of fraud in the contract is on the same plane: it is limited in like manner. The invitation to confide is solely an invitation to confide within business limits.

The terms of the invitation are in every case safely limited by the wholesome theory that it is always interpreted according to ordinary business usage. The principal may be involved by his agent in losses—perhaps heavy losses; but the point is, that they must always be limited losses. You clothe a factor with credit, and he may involve you up to the hilt of that credit. But if you clothe a coachman with livery he may involve you in damages without any limit whatever.

The moral foundation of the rule also disappears. Instead of sustaining a credit which you have deliberately invited, you are asked to compensate a casual stranger between whom and yourself there is no privity—no moral responsibility—whatever. In the one case, you have invited me to trust your agent: he has deceived me: you are responsible. In the other, you have invited no confidence, and have entered into no moral bond for his good behaviour.

Yet the connexion of the sound idea of liability where there is invitation and confidence with the newer idea of liability where there is an act done 'in the course of

employment ' is not altogether obscure. For an act done by an agent *appointed to make contracts* which falls ' out of the scope of his employment ' is likewise inevitably outside the scope of the invitation to rely on him.

Hern's case was decided in 1709. We have quoted Chief Justice Lee's luminous approval of it, and the ground of confidence on which it was based. Lord Ellenborough, a hundred years after Holt, laid down the same doctrine on the same grounds. In *Alexander* v. *Gibson* (1811) 2 Camp. 555, we find him holding that a servant who is sent to sell a horse has implied authority to warrant the horse to be sound. This is, of course, a case of pure contract. It is a question of what the purchaser reasonably thinks the servant is authorized to promise him, and this is compendiously expressed by saying it is a question of what promises were ' within the scope of the employment '. It is not a question of tort at all. So, in Campbell's note, it is observed on the authority of Abbott on Shipping that a ship-broker may warrant convoy.

In respect of the torts of servants, independent of contract and confidence, we can trace the liability no further back. In 31 Eliz. it had been solemnly argued that a servant's entry on a lessee did not give an action against his master, even in a case where the latter was actually present and commanding the trespass.[1] Much less could the servant prejudice him in his absence.

In 44 Ed. III, 20, the taking of unlawful toll at a mill by a servant could not prejudice the master ; though it was doubtless in the scope of the servant's duties to take toll in proper cases.

And so in 13 Hen. VII (Y. B. p. 15), it is held no trespass in the master if a servant (acting, it is fair to presume, in the course of his employment) chase his

[1] *Seaman* v. *Browning*, 4 Leon. 123.

cattle on to another's land. 'Si mon servant encontr̄ mon gre enchasse mes bestes en le soil dun estranger, jeo ne serai puni pur c̄, eins mon servant; auter est si mes bestes escapent encontre mon gre, car la jeo serai puni. *Quære* si jeo custoð un chien, et mon servāt encontr̄ mon gre encite et cause le chien a morder et occire les bestes dun estranger, si jeo serai puni pur ceo.' This is exactly parallel to the case of fire spreading:[1] the owner of the land is liable for his fire or his cattle, by whosesoever negligence they escape, unless it is by the active intervention of a servant or a stranger that they come on to another's premises.[2]

In 'Doctor and Student' (A.D. 1518) we find that, 'for trespass or battery, or wrongful entry into lands or tenements . . . the master shall not be charged for his servant, unless he did it by his commandment.' And the author[3] goes on to say (after stating that a master is liable for the effects of fire kindled by a servant in his house), 'If the servant bear fire negligently in the street, and thereby the house of another is burned, there lieth no action against the master.'[4] The Student (a common lawyer) raised the point that by the canon law (citing 'Summa Angelica', t. 'Dominus', paragraph 4), if the 'household' offend 'in their office' (i.e. in the course of their employment) the master shall be liable, but not otherwise—and in no case if the office be a public (State) function. For he ought to choose honest [and careful] people. This reasoning of the canonists is repudiated by the

[1] *Infra*, p. 19 *seq.*

[2] As another train of thought regards it, the intervening servant assumes possession of the beasts: they are *his* beasts when he deals with them against his instructions, and he is answerable accordingly. This might perhaps afford a test of what are acts 'within the scope of employment': they are such acts as do not involve the assumption of possession of material objects entrusted to the servant (or agent ?).

[3] St. Germains. [4] p. 236 (ed. 1761), ch. xlii.

Student in the name of the Common Law. By statute and otherwise, certain public officers—sheriffs, the Lord Butler, and the like—*are* liable for their deputies. Other people are not.

Again, in 1606,[1] a shipowner was held not liable for the fault of his crew, who had, under letters of marque, attacked 'un French ship'. Dodderidge argued that this was a public matter, and that in public matters the master was bound by the act of his servant: and he cited cases which appear to be instances (like the fire) of an absolute obligation on the part of the master. 'And since Commerce is a public matter for the good of the Realm, anyone who puts a ship in commercial use ought to provide servants who will not commit public offences.' The owner, he proceeds, sets out the ship on purpose to make captures—he implies, though he does not use the phrase, that capture was the scope of the crew's employment—and if they make mistakes, and capture friendly vessels, he must answer for it. But Chief Justice Popham disagreed. 'If a master sends his servant to do an unlawful act, he will be responsible for all unauthorized variations in the doing of it. But if he sends his servant to perform a lawful act, as in this case to capture the goods of the enemies of the king; and he captures the goods of friends, the employer is not to answer for it.' Dodderidge, unconvinced, remarked that in the Civil Law the employer was responsible in all public cases. Thus the whole force of the case turned upon the consideration of its public character. There is no suggestion that in private, common law matters, any responsibility on the part of the employer could arise.

In 1618 we find Chief Justice Mountague laying down substantially the same doctrine.[2] The occasion, however,

[1] *Waltham* v. *Mulgar*, Moore, 776.

[2] *Southern* v. *How*, Poph. 143.

was a case of contract, very like *Hern* v. *Nichols*: a merchant had given an employee jewels worth £80: the latter sold them through the plaintiff to the King of Barbary for £800, which the plaintiff was compelled by His Majesty to disgorge. Held, that no action lay against the merchant on account of his servant's malpractices.

St. Germains[1] flatly contradicts, by anticipation, *Hern* v. *Nichols*. 'If a man send his servant to the market with a thing which he knoweth to be defective, to be sold to a certain man, and he selleth it to him, then an action lieth against the master: but if the master biddeth him, not to sell it to any person in certain, but generally to whom he can, and he selleth it accordingly, there lieth no action of deceit against the master.' Traces of this dictum are clearly visible in *Southern* v. *How*.[2]

In *Hind* v. *Wainman et al.* (1611) 1 Brownl. & Gold. 176, the indisputable proposition was laid down that 'if one takes cattle as bailiff to another, and by his command, this shall be adjudged to be as well the taking of the master as of a bailiff in trespass'.

And again, in 1682, close upon Holt's time, three judges lay it down, in *Kingston* v. *Booth* (Skin. 228), that if servants commit a trespass in the doing of a lawful and commanded act, they do not involve the master. 'If I command', say Withins, Holloway, and Walcot JJ., 'my Servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my Servant, but my Servant for himself, for that it was his own Act,—otherwise it was in the Power of every Servant to subject his Master to what Actions or Penalties he pleaseth.' In this case the plaintiff had hit upon the ingenious scheme of 'tricking the defendant out of possession' of land, by taking up his abode in a little wooden house

[1] 'Doctor and Student', p. 236.

[2] Poph. *ut supra*, p. 16.

carried on wheels on to the land. The defendant sent servants to pull down the house, telling them to take care not to hurt him; however, they did. And, in an action of trespass and wounding the defendant properly pleaded Not guilty, for that he was not guilty of the wounding and the pulling down the house was a lawful act.[1]

Michael v. *Alsetree*[2] is really a similar case. A servant took a pair of unbroken or partly broken horses into Lincoln's Inn Fields to exercise. They hurt a passer-by. It was held that it might be inferred that it was by the instructions of the master that the horses were being exercised in a public place, and that this being an unsafe procedure, the action lay against him. He did an obviously dangerous thing: he was thus in fact negligent, and he was responsible for the probable consequences of his negligence when they in fact occurred. Had the servants taken the horses out in that improper manner without his consent (as to which *res ipsa loquebatur*), it does not appear that he would have been held responsible.[3]

To this general rule of non-liability there existed a statutory exception in the case of staples. By 27 Ed. III, c. 19, 'no merchant nor other . . . shall lose or forfeit his goods or merchandize for the trespass and forfeiture of his servant' unless he do it by command of the master 'or that he hath offended in the office in which his master hath set him, or in other manner that the master may be holden to answer for the deed of his servant by the law

[1] In Chancery, in the case of *Childrens* v. *Saxby* (1683) Vern. 206, Lord Nottingham allowed the defendants, who had levied execution in breach of an injunction, to be ordered to repay money seized by their bailiffs: this case scarcely needs consideration, as it depends on the peculiar jurisdiction of equity.

[2] (1676) 2 Lev. 172.

[3] Thus, Holmes doubts 'whether *Michael* v. *Alsetree* is an example for the principle in question. It rather seems to me a case in which the damage complained of was the natural consequence of the very acts commanded by the master' (4 Harv. L. R. 354).

merchant, as elsewhere is used'. This can only refer to offences against the statute itself, which contains exceedingly sweeping provision for forfeitures. It is easy to understand such an exception to the general rule.

The advent of Holt, in 1688, produced a decided change. He may not have decided any case which is irreconcilable with the doctrine we have just seen laid down in his court. But his attitude paved the way for a radical innovation.

It is, however, his dicta rather than his decisions, that have had such a sweeping effect.

In 1697 a freeholder was held liable for the effects of a fire kindled on his land by his servant. But that case (*Turberville* v. *Stampe*, 2 Ld. Raym. 264) turned, not on liability for servants, but on liability for fire. A landholder is absolutely bound to keep in his fires; the question was whether this was 'his' fire. His servant lit it in the ordinary course of husbandry: therefore it was held that it came within his absolute duty. An absolute duty is on a par with a contractual duty. The person on whom it lies is bound to insure that others shall not sustain certain kinds of damage. His own conduct and privity are immaterial. The occupier of land is absolutely bound to insure against the escape from it of things not naturally there, including fire. He is not excused by delegating this duty to a servant who fails to perform it. If a menagerie attendant allows a lion to escape, the proprietor is not liable for consequent damage because he kept a servant, but because he kept a menagerie. The *ratio decidendi* in *Stampe's* case was not that the servant did wrong, but that the facts provided the landowner with no excuse.

As is pointed out by Williams J. in *Pickard* v. *Smith* (10 C. B., N. S. 480), 'where a duty is imposed, and the performance omitted, the fact of its having been entrusted

to a third person furnishes no excuse either in good sense or law.' Yet *Turberville* v. *Stampe* is incessantly referred to in the reports as a leading authority for the general proposition of the liability of the master for the servant's negligence. Superficially, it is; but the authority dissolves on analysis.

There is a much earlier fire case in Easter Term, 2 Hen. IV (A. D. 1401 : Y. B., p. 18)—*Beaulieu* v. *Finglam* : the plea recites 'quod quilibet de eodem regno ignem suum salvo et secure custodiat, et custodire teneatur, ne per ignem suum dampnum aliquod vicinis suis ullo modo eveniat' : and charges Finglam 'pro defectu debitae custodiae'. The mediaeval doubt was raised whether the fire could be called the defendant's fire : what property can one have in sparks ? But it was brushed aside by the Court. In such a case one is liable for what one's servant or hosteller does. If a servant sticks a candle in the wall, and it sets fire to the straw and burns the house and a neighbour's house, the master is liable. Hull remarked that it would be against all reason to impute blame or default to a person, where in fact there is none—for the negligence of his servant cannot be said to be his. But Thirning reminded the Court that a slayer by accident forfeits his goods, although he is blameless. And Markham laid it down that the principle applies to fire raised by anybody within the protection of the house. It is not, therefore, the fact of servantship that creates liability. It is the paramount obligation to keep in fire, whether one is in fault or not.

'Jeo respondra a mon vicine pur cestuy que enter me meason per ma conge ou mon sciens, ou est hoste p. moy ou per mon servant ; s'il face ou auscun de eux fait tiel chose . . . p q̄l fesans la meason de mon vicine est arce.'

There is thus no question of servantship. It can scarcely be doubted that the original gist of such an

action was negligence, and that the exceptional dangers of fire caused the obligation to become, as it is at the present day, absolute. What cannot be affirmed is, that these exceptional dangers led to any exceptional relaxation of the rule of non-responsibility for the acts of a servant. So, in *Ellis* v. *Gas Consumers Co.* (1853) 2 El. & Bl. 767, the act for injurious consequences of which the defendants were sought to be made responsible was one illegal in itself. (Cf. *Pursell* (1914) 111 L. T. 32, and *Hunter* (1836) 14 S. 717.)

With this case in mind, let us recur to *Turberville* v. *Stampe.*

'If the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire: for it shall be intended that the servant had authority from his master, it being for his master's benefit' (*per* Holt C. J.).

Obviously, this sentence is given as a rough test of the liability of the master for the consequences of a *lawful* act of the servant—not for those of an unlawful act. Holt cannot have meant that it was for the master's benefit for the servant to go away and leave the fire to spread. He adds a dictum to the effect that 'if my servant throws dirt into the highway, I am indictable'. Precisely on the same ground, the landowner is responsible for noxious matter which escapes from his land, and it is no defence that it escaped through the officious act of a servant doing his regular work.

This was first pointed out by Littledale J. in *Laugher* v. *Pointer*, and Parke B. repeats the distinction in *Quarman* v. *Burnett.*

'Where a man is in possession of fixed property he must take care that his property is so used or managed that other persons are not injured; and that, whether

his property be managed by his own immediate servants, or by contractors with them, or their servants, such injuries are in the nature of nuisances: but the same principle which applies to the present owner of land or houses by a man or his family [1] does not apply to movable perishable chattels, which in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to intrust them with them.'

In short, the idea of 'scope of employment' was, historically, struck out as a limitation on the absolute liability of the master in such cases.

The form of the action, nevertheless, suggested that in these cases the master was being held responsible for the servant's tort. And Holt himself seems to have fallen under this impression. It was a natural step: for though the liability in these cases was absolute, failure to fulfil it was charged as negligence. Why, therefore, should not a master be liable in all cases of his servant's negligence? It was a specious argument, and a tempting analogy.

It was an inaccurate one. Rolle's Abridgement ('Action and Case', B 1) says: 'If my fire *by misfortune* burn the goods of another man, he shall have an action on the case against me.' So that negligence in the modern sense is not really the gist. And it is misfortune if the defendant's servant, acting for his benefit, lights a fire which spreads: the relation of the parties makes it the defendant's fire. Tort or no tort on the part of the servant makes no difference.

The head-note to *Turberville* v. *Stampe*, however, expands the decision into a statement that 'a master is responsible for all acts done by his servant in the course of his employment'—and Willes J. quotes this with

[1] Is there here a reminiscence of the *actio de eiectis et effusis*?

approval in *Patten* v. *Rea* (2 C. B., N. S. 614), as though Lord Holt had said it.

It is difficult to resist the conclusion that we have here another case to add to the long list of misguided head-notes. There is no justification for it in the report in Lord Raymond.

From the report in Cumberledge (p. 459), however, we find that Holt seems to have regarded the gist of the action as negligence, in the modern sense ('special neglect'). And he added the crucial words: 'though I am not bound by the act of a stranger in any case, yet if my servant doth anything *prejudicial* to another, it shall bind me where it may be presumed that he acts by my authority, being about my business'. This was said, let it be repeated, with implied reference to the peculiar case of fire. In the report of the case in Lord Raymond, it is the *proper* action of the servant for which the master is responsible. It is *his* fire because his servant properly lights it.[1] According to Cumberledge, it is the servant's negligence which involves the master. It is agreed that Lord Raymond is the better reporter: and we may have here a mere case of mistake and confusion on the part of Cumberledge. But it is evident from other cases that Holt was willing to impute the consequences of the servant's neglect to the master, and there was no reason why this should not now be extended beyond this ancient liability, which, as we have explained, is a liability *qua* landholder, not *qua* employer.

Three (obiter) illustrations which he propounds in *Jones* v. *Hart*[2] show how far he was prepared to go. 'If the servants of *A* with his cart run against another cart wherein is a pipe of wine, and overturn the cart and spoil the wine, an action lies against *A*. So, where a carter's servant runs his cart over a boy, action lies against the

[1] Cf. *Wilson* v. *Peverley* (1823), 2 N. H. 548. [2] (1698) Holt, 642.

master for the damage done by his negligence. And so it is if a smith's man pricks a horse in shoeing; the master is liable. For whoever employs another is answerable for him, and undertakes for his care to all that make use of him,' or, we suppose, that come in his way.

Two of these illustrations are quoted by Bacon (Abr. K 370) as actual cases! Lord Raymond misled the learned author: he prints them as one 'anonymous' case, in the historic tense: 'The servants of a carman ran over a boy in the street and maimed him, by negligence; and an action was brought against the master, and the plaintiff recovered'! He in turn was misled by 'Magister Place' *cuius ex relatione* his Lordship tells the tale. (The report in Salk. (ii. 441) is also rather misleading, but a reference to Farresley's 'Holt' would have cleared up the matter.[1])

The importance of *Jones* v. *Hart* lies in its dicta, and not in its decision. The reporter nonchalantly introduces into his memorandum (besides a note of *Lane* v. *Cotton*[2] which exactly reverses the point there decided) an account of certain dicta of Holt, to the effect that *A*'s servant runs with his cart against another cart, or against a boy, and spoils a barrel of sack in the one case, or injures the passer-by in the other. Here, at nisi prius, with his fancies unchecked (cf. *Lane* v. *Cotton*) by other lawyers, Holt clearly lays down the modern principle, which thus rests on the precarious foundation of an obiter dictum in a nisi prius case.

The actual case itself (*Jones* v. *Hart* (1698) Holt 642, 2 Salk. 441, 1 Ld. Raym. 738) is, so far as its own facts are concerned, a case of contract. A pawnbroker's servant took an article in pledge, and a contract thereupon arose between the broker and the pledger. When the latter, through the servant's default, was unable to restore the

[1] Kenyon C. J. keeps the ball rolling in 1 East, 108 (*McManus* v. *Crickett*).

[2] *Infra*, p. 27.

goods he was of course liable. The gist of the action was, however, not assumpsit but trover; and this contributed to reinforce the notion of the master's liability for all torts of his servant committed in the course of employment.[1] A similar mixed case of tort and contract had arisen in *Boson* v. *Sandford* (1690) 3 Mod. 321: various people had participated in arranging a coasting voyage, and it was doubted whether, if goods which they accepted for carriage were damaged, they could not be sued severally as tort-feasors. It was decided that they could not.

'The ground of the action is upon a trust reposed in all, and every trust supposes a contract; and in all cases grounded upon contracts, [all] the parties who are privies must be joined in the action. . . . Therefore, though the neglect in this case was in the servant, the action may be brought against all the owners, for it is grounded *quasi ex contractu*, though there was no actual contract between the plaintiff and them [personally].'

In *Middleton* v. *Fowler et al.* (1698) 1 Salk. 282—which, indeed, was only at nisi prius—a similar case, depending really on contract, arose. That was the case of a stage-coach proprietor (not a carrier) whose driver had voluntarily taken up a passenger's luggage and lost it. The Chief Justice held that no action lay against him—'for no master is chargeable with the acts of his servant but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master.' Had the master's business been to carry luggage, at a price charged for it, the law of carriers would have applied.[2] Otherwise, there was no duty entailed by the gratuitous acceptance of luggage, and therefore

[1] The parallel difficulty created in such cases by the fact that an infant is liable in tort but not in contract is a well-known commonplace of text-books.

[2] See, for a case of common carriers (by sea), *Boson* v. *Sandford et al.* (1690) 3 Lev. 258; 3 Mod. 321, *supra*, and cf. Browne, *Adm. Law*, 141.

there could be no negligence. And the acceptance of money by the driver could not make his master a carrier for reward, for it was not within 'the execution of the authority' committed to the driver.[1]

The profoundly interesting debate in Y. B. 2 Ed. IV, 4, 4, regarding the power of a servant to make a good title to his employer's property, is not material in this connexion. (Some judges thought that the case depended on whether or not the servant had power to sell.) Nor need we trouble here with the sad case of *Nickson* v. *Broham* (1712) 10 Mod. 109 in which Parker C. J., after expressing the opinion that a master was not bound by his servant's forbidden act in selling a security on credit instead of getting it cashed, yielded to the superior genius of a juryman, who 'informed his lordship that he took the Practice to be otherwise, because, whether a Servant who was used to act upon the Credit of his Master went against the orders of his Master or not, was a Fact which could not be known to a third Person'. This concerned contract only.

In *Harvey* v. *Syliard* (1732) 2 Barn. 234, it was argued that the delivery of a package to a carrier's servant made the servant liable in case of loss, the gist of the action being tort (trover). Substantially, of course, the case is one of contract, and the plaintiff was non-suited.[2] In *Perkins* v. *Smith* (1752) 4 Wils. 328, a servant was held liable to restore property which was made over to him by a bankrupt to satisfy a debt due to the master.

Mead v. *Hamond* (8 Geo. I, 1 Stra. 505), decided by Pratt C. J., is also substantially a question of contract. An ingot was delivered to the defendant's servant to assay: it was not returned, and of course the employer was liable, though the form of the action was trover. *Grammar* v. *Nixon* (12 Geo. I, ibid. 653: Eyre C. J.) is a case of the same kind. Such cases as these, where there is already

[1] Cf. *Ord* (1898) (1 F. 17).

[2] Cf. *Ord*, *supra*.

a relation of contract or confidence established between the parties, when the act or negligence complained of takes place, give rise to an action which in form is similar to the remedy afforded to a complete stranger. They powerfully contribute to create the impression that a principal or master is liable in the one case as in the other.

Some influence must also be attributed to the cases where a public officer, such as a coroner or sheriff, who is under an absolute duty, is held liable if that duty be not somehow performed (cf. *Naylor* v. *Sharpley et al.* (1675) 1 Mod. 198). In *Boson* v. *Sandford* the judges say: 'It is like the case where a sheriff levies goods upon an execution, which are [then] rescued out of the hands of his bailiffs: an action of debt will lie against him, though there was no actual contract between the plaintiff and him: for, he having taken the goods in execution, there is *quasi* a contract in law to answer them to the plaintiff.' [1] This, it will be observed, was *not* a case at nisi prius.

Lane v. *Cotton* (1701) 12 Mod. 489, indeed, turns specifically on the liability of a postmaster under an Act of Parliament. Holt observes that the postmaster has power to put deputies in, and so to put them out, and therefore ought to answer for them. This is of course said with reference to the public office which is in question, and as to which, on the analogy of carriers,[2] the official may well be an insurer. But the force and generality of the Chief Justice's language indicate the tendency he had to impose liability on employers. Turton, Powis, and Gould JJ. did not agree with his judgment even in the case before him. They considered the postmaster's deputies as co-workers in the public service.

[1] The liability of a sheriff is, as explained by Judge Cowen in New York (*Wright* v. *Wijax*, (? 1838) 19 Wendell, 347), referable to the head of public law.

[2] And, according to Holt, of smiths: vide loc. cit. p. 484.

These cases of contract and of absolute public duty are irrelevant. The liability in tort constitutes a gigantic inverted pyramid whose apex is nothing but nisi prius dicta.

And so we find Blackstone in 1765 observing that 'if a servant by his negligence does any damage to a stranger, the master shall answer for his neglect', as if that had been the glory of English law *per saecula saeculorum*. He quotes the case of the negligent keeping of fire, and puts it, mistakenly, on the ground of service, comparing it with the case of 'a servant going along the street with a torch', and carelessly setting fire to a house, 'for there he is not in his master's immediate service'. But he clearly might be: the distinction is not between acts done in and out of service, but between cases of a landowner's absolute liability and cases of negligence. Blackstone considers the rule founded upon public policy 'in order to induce masters to be careful of the choice of their servants': whereas Bacon, in his Abridgement, considers that it is highly reasonable that the master should answer for his substitute, because 'in strictness everybody ought to transact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another'!

It was not until *Brucker* v. *Fromont* (1796) 6 T. R. 659, apparently, that the processual doctrine was authoritatively established: that a declaration charging *A* with driving a cart negligently was supported by evidence that his servant did so. This was referred to *Turberville* v. *Stampe*, which, as we have seen, by no means involves any such consequence.

What one would like to know is the precise process by which Holt's dicta acquired the force of law between, say, 1698 and 1725. In the latter year we find the principle of the master's liability for acts done in the course of the

servant's employment stated as unquestioned law by Lord Raymond. Few things strike the student of English law so forcibly as the remarkable paucity of reports of decisions during the early Hanoverian period. Holt shot his bolt: it is difficult to trace how it went home. Neither Parker nor Pratt were extraordinary judges: it is possible that their very unreported mediocrity actually covers the crystallization of Holt's imaginations into legal dogma. Parker, we know, was a creature of Holt's. Still, the transition must have been in some respects abrupt. On circuit, attorneys' wigs must have shaken, and counsels' gowns rustled, many a time, at the doctrine propounded from the judgment-seat. In remote counties people must long have held to the law of Elizabeth and Cromwell.

I have suggested elsewhere[1] that the doctrine of the absolute power of a parliamentary majority is to be traced to the careless generalization of a rule of convenience. It will, I think, be clear to most students that the doctrine of the employer's responsibility was due to no considered theory of civil liability, and to no survival of early mediaeval notions, but was derived from an inconsiderate use of precedents and a blind reliance on the slightest word of an eminent judge; and from the mistaken notion that his flights of imagination in picturing highway accidents were actual decided cases.

We get a very interesting case in Lutwyche, in 1700 (vol. ii, p. 1496), in which Randle sues Deane and Pope for beating his horses and servants. As the defendants tried to justify their action 'come servants al un corporation', it is certain that the corporation (of B. in the county of D.) would have been sued if Holt's new doctrine had penetrated into the Common Pleas.

In the Exchequer (Equity) in 1721 (*Naish* v. *H. E. I. C.*,

[1] *Quarterly Review*, January 1913, 'The History of Majority Rule'.

2 Comyns, 461) Comyns B. asserts that 'if the agents of the company had done anything unlawful, which the company did not authorize them to do, they ought to be answerable for it, and not the company. *Nothing is a more certain and known rule in law, than that if I command a lawful thing, and my servant do it in an unlawful manner, he must be answerable for the trespass or misdemeanor, and not the master*'. Mr. Rose, the editor of these reports in 1792, naturally (at that time of day) adds a query as to the master's non-liability in civil proceedings: but Comyns makes no such distinction. We have here, therefore, a strong re-assertion of the older law as unquestioned in the Exchequer even in 1721. The facts of the particular case need not be gone into, as it turned on the peculiar doctrines of equity.[1]

The doctrine, in other words, was a preserve of the King's Bench for twenty or thirty years. Yet, novel as it was, it grew apace. By the end of the eighteenth century Bayley and so great an authority as Holroyd were prepared to hold that a mere hirer of a carriage for the day was liable for the coachman's faults. Perhaps it is not impossibly fantastic to suggest that the events of 1715 and 1745, demonstrating as they did the lengths to which a master might command the allegiance of his servant, may have played their part in reconciling lay and legal opinion to the innovation.

We find, however, in *Horseman qui tam* v. *Gibson* (1716) Fortes., 32 (Exch.)—a penal action for using the King's moorings for a merchantman—the master held liable to the penalty, though not 'on board' as required by the statute, because he is liable for the conduct of his subordinates, who are in actual control. This is on

[1] The question was whether (as the Chief Baron, Carter B., and Thompson B. thought) the company ought to restore a deposit which had been made under pressure exercised by their agents.

a par with the penal liability of a liquor-dealer for the acts of his servants under the Licensing Acts,[1] and is parallel to the civil liability of an owner when his absolute duties are unfulfilled. The Court take occasion, however, to observe that 'The [Ship] Master is answerable at Common Law for the negligence of his servant; the whole care and charge of the ship is committed to the master, who is *exercitor navis*; he engages against everything except *damnum fatale*.' Shipowners being so frequently common carriers, such a deliverance is easy to understand.

In 4 Geo. II (1730), *R.* v. *Huggins*, Fitz-G. 177, the Warden of the Fleet was indicted in respect of the death of a prisoner through the violence of his subordinates: and the maxim 'Respondeat superior' is alluded to as applying to civil cases.

In *Jarvis* v. *Hayes* (1738) 2 Stra. 1083 we have a case of a carman's employer being sued by a man who had been thrown off a ladder by the cart. But we are now well on to the middle of the eighteenth century.

By 1799 the doctrine had been so firmly established that it was actually extended (in *Bush* v. *Steinman*,[2] 1 B. & P. 404) to charge a landowner with the consequences of the negligence of a builder's workman. Eyre C. J. was at a loss to know exactly on what basis to ground the decision; but he thought it convenient that the injured person should not be put on inquiry as to who exactly it was that caused the damage. This is a fourth ground on which the doctrine may be rationally based; it seems to us no more satisfactory than those which turn on the

[1] Cf. pp. 205–11, 216, *infra*.

[2] *Bush* v. *Steinmann* is severely commented on in a very capable judgment in *Hilliard* v. *Richardson* (1855) 69 Mass. 354. Their Honours distinguish *Matthews* v. *W. Lond. Waterworks* on the right ground that the defendants had a public duty to discharge, and could not be relieved from it by pleading the negligence of their employees. They cite Maule's comment on it in *Overton* v. *Freeman* (1862) 11 C. B., N. S. 872.

control of the master (Blackstone), the profits of the master (Raymond), the choice of the master (Molloy), or the indulgence to the master (Bacon). Such cases as *Stone* v. *Cartwright* (1795) 6 T. R. 411; *Littledale* v. *Lonsdale* (Earl) (1793) 2 H. Bl. 267; and *Matthews* v. *W. Lond. Waterworks* (1813) 3 Camp. 403,[1] are irrelevant, since they again afford cases of liability for the acts of servants who have been ordered to carry out operations in respect of which the master is an insurer. If one excavates, one excavates at one's peril. If one orders a servant to excavate, the peril remains.

In 1816, one finds Best S. remarking that 'the action is a hard one at best'.[2] But Gibbs C. J. (taking the 'profit' line of thought) awarded damages against the partner of the delinquent servant's master. Best, however, when Chief Justice, took occasion to say (in *Hall* v. *Smith* (1824) 2 Bi. 156)—'If the doctrine of *respondeat superior* were applied to [public road] commissioners, who would be hardy enough to undertake such offices [unpaid]?', and he, too, finds the ground of the doctrine in the principle of 'profit': i. e. that 'he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it'—a principle which would place every one who hires a taxicab in an unenviable situation!

Ill weeds grow apace. It was actually argued (and decided!) in 1825 that a partner who had retired from the firm was liable for the negligent driving of the firm's servant *because his name was on the cart*![3] Abbott C. J. ruled that as the defendant 'held himself out to the

[1] This case is very difficult to distinguish from *Harris* v. *Baker* (1815) 4 M. & S. 27, also decided by Ellenborough C. J. In the one case the excavated earth, in the other road scrapings, was left in heaps by a water company and a road company respectively.

[2] In *Weyland* v. *Elkins*, Holt N. P. 227.

[3] *Stables* v. *Eley*, 1 C. & P. 614.

world as the owner of the cart and the master of the driver of it, he was responsible for the negligence of such driver '. Perhaps this result may be put down to Scarlett's eloquence for the plaintiff, who got £6 10*s.*, so that no appeal was probable. (In *Smith* v. *Bailey* [1891] 2 Q. B. 403 the case was overruled.)

And so we come down to *Laugher* v. *Pointer* (1826) 9 B. & C. 548, in which Abbott and Littledale differed from Holroyd and Bayley as to the liability of a casual hirer for the negligence of a driver: a case remarkable for the brilliant judgment of Littledale. The non-liability of the hirer was conclusively declared.

Quarman v. *Burnett* (1840) 6 M. & W. 499 set the seal on *Laugher* v. *Pointer*, and showed that the hirers might be regular hirers without incurring liability for the torts of the regular coachman supplied.[1] And this, even though they kept a livery for him, and although the carriage was their own. The Court definitely repudiated the idea that it is the 'selection' of the particular individual which of itself involves liability.

'If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant. . . . If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger appointed by themselves, it would have made all the difference.'

Parke's classic words are worthy of quotation:

'That person is undoubtedly liable, who stood in the relation of master to the wrong-doer—he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who would remove him for misconduct, and whose orders he was bound to receive and obey. But the liability, by virtue of the relation of master and

[1] The late Mr. Southmayd, of New York, though he possessed a fine carriage and horses, used always to drive in a hired conveyance for this reason.—J. H. Choate, in *Year Book, N.Y. Bar. Ass.*, 1913, p. 195.

servant, must cease where the relation itself ceases to exist. And no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another. Consequently . . . to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, and cannot be maintained to its full extent without producing consequences which would, as Lord Tenterden observes, " shock the common sense of all men " : not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames be liable for the acts of the owners of those vehicles, or their servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street '.

[NOTE :—As to Holt's mentality, the following remarks by Cooper J. (*Opinion*, Philadelphia, 1810) are of some interest: 'Opinions and desires rendered beyond what the case before the court requires are imprudent, and of no weight or authority . . . and volunteered opinion out of the case can never be the fruit of due consideration. I cannot help thinking that this remark will apply more than I could wish to Lord Holt's general conduct on the Bench.' Cf. per Jessel M.R. in *Wallis* v. *Smith*, 21 C. D. 265 : 'I distrust *dicta* in all cases, and especially *dicta* during argument.']

CHAPTER II

LIABILITY FOR AGENTS AND PARTNERS

I. Agents

So far we have considered, with only incidental allusions to others, the case of the Servant.

We come now to the case of the Agent. Here it is laid down that the torts of the agent only impose liability on the principal if the agent is also a Servant,[1] i. e. he is dangerous *qua* servant. So long as he is a mere contractor, the fact that he contracts to make contracts for the other party, or to represent him in other ways, thereby becoming an Agent, does not involve that other in his misdeeds.[2] There must be the element of continuous and arbitrary control to constitute servantship. The control need not be complete : a shipmaster is none the less the servant of the owner because the policy of the law prevents the latter from interfering with the navigation. A butler is not a slave. But the control must be general. 'The test is', says Crompton J.,[3] 'whether the defendant retained the power of controlling the work.'

We find the idea of a principal's liability for the acts of his agent distinctly negatived in the case of *Freeman* v. *Rosher* (1849).[4] It was laid down that there must

[1] Wright on Agency, p. 277; Pollock on Torts, p. 81. Cf. p. 145 *inf.*

[2] The latter may of course be liable on other grounds, e. g. where his liability is absolute, or where the wrongful act is ratified.

[3] *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 578: casual labourer employed to do draining work, 'servant' of the employer. See *Murphey* v. *Caralli* (1864) 3 H. & C. 462: cotton merchant's servant *not* warehouseman's servant.

[4] 13 A. & E. 780.

be express authorization or ratification. Bailiffs were instructed to distrain for rent : they sold a fixture, and it was held that the innocent receipt of the proceeds was no ratification, and that no authorization was implied to distrain in an illegal manner.

'It is clear', says Patteson J., 'that a principal is not responsible for a trespass by an agent, unless he gave a prior authority or subsequent assent. Here, the warrant was the only prior authority, and clearly did not extend to destroying a building or removing a fixture.'

In one case, *Patten* v. *Rea* (1857) 2 C. B., N. S. 613, Williams J. reverses the principle, and considers obiter that a master is liable because the servant is his agent. And so Farwell L. J. says obiter in *Lloyd* v. *Grace, Smith & Co.* [1911] 2 K. B. 508, that the principle of vicarious liability applies to all cases of principal and agent (except that of partners). But this is in direct conflict with the above established rule, and is possibly traceable to a misunderstanding of Story on Agency.

Story (§ 452) states broadly, that 'a principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, *torts*, *negligences*, and other malfeasances or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize or justify, or participate in, or indeed know of, such misconduct ; or even if he forbade the acts, or disapproved of them'. But it is clear that the author was only contemplating cases where a privity had been established between the third person and the principal : 'In every such case, the principal holds out his agent as competent and fit to be trusted ; and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of his agency.'

The same is true of Selborne's very wide statement (in *Houldsworth* v. *City of Glasgow Bank* (1880) 5 A. C. 317)

that a principal is liable for the torts of his agent. As he carefully explains, 'it is of course assumed in all such cases that the party who seeks the remedy *has been dealing* with the agent in reliance upon the credentials with which he has been furnished by the principal. . . .'[1]

There are to be found in the English cases other very sweeping expressions regarding the liability of principals for the misdeeds of their agents. This, however, is only loose language. Judges will speak of 'agents' in one sentence, and of their 'masters' in the next. They have in mind, though they speak of 'agents', really only the case of the agent who is a servant, which is the only case they are considering.

As an example of the mental confusion to which we allude, one may instance *Mackay* v. *Comm. Bank of New Brunswick* (1874) L. R. 5 P. C. 394, where the Privy Council say that a 'master' is liable in certain cases for his 'agent'![2]

The truth of this proposition, that the word 'agent' is used in these cases (nearly all of bank officials) as a descriptive equivalent for 'servant who is an agent', is thrown into clear relief by *Smith* v. *Martin* [1911] 2 K. B. 775. If it is enough to show that the subordinate was an agent, why was it considered so essential to establish in that case the relationship of master and servant? It would have been much easier to show that she was the Council's agent to teach.

[1] Selborne shows that he is speaking of cases of privity, by adding that the alleged principle that 'the master is liable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit' is 'a principle, not of the law of torts . . . but of the law of agency' (p. 326). On the face of it 'a principle enunciating a rule as to liability for torts independent of contract' is, and must be, a principle of the law of tort.

[2] See also per Farwell L. J. in *Lloyd* v. *Grace, Smith & Co.* [1911] 2 K. B. 507.

'Servant' of course is in this connexion a word of wide significance. Yet between the independent contractor who cannot pledge the principal's credit, and the servant who can, there is room for the independent agent, who can pledge the principal's credit, but may choose his own method of doing so. Perhaps factors,[1] auctioneers, and brokers constitute the principal members of the class. The cases on embezzlement are helpful in dealing with the problem: the new cases on employee's insurance must be invoked with some caution.

In *Murray* v. *Currie* (1870) L.R. 6 C.P. 24, Willes J. observed with relation to stevedores:

'They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. . . . I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable.'

And that, even if it is the employer's own servant who is temporarily lent to the independent contractor.

In *Udell* v. *Atherton* (1861) 7 H. & N. 172, almost the same question as in *Hern* v. *Nichols* occurred over the sale of some timber, *represented* to be sound. No *warranty*, however, was given that would bind the defendants,[2] so that the action was brought on the deceit. Barons Martin and Bramwell held the principal absolved. Pollock and Wilde thought he was liable. The interest of the case lies in the distinction drawn between liability for servants and for agents respectively. The subordinate here was

[1] In *Bush* v. *Steinman*, Heath J. refers to *Hern* v. *Nichols*, where the principal was held liable 'although a factor is not a servant'. But, as we have seen, that case turned on contract.

[2] Cf. *Brady* v. *Todd* (1861) 9 C.B., N.S. 592.

an agent, and the liability was (as in *Hern* v. *Nichols*) really contractual: the employer had invited the buyer's confidence. Coleridge and Kingdon say *arguendo*:

'As regards liability for damage, a stricter rule prevails where the relation of master and servant exists, than in the case of principal and agent. Every servant is in one sense an agent, but every agent is not a servant. Blackstone treats of servants as distinguished from agents, and divides them into four classes: Black. Com. i. 425. It is clear that a principal is not liable for a malicious trespass committed by his agent [or servant]. But a principal is not responsible for the unauthorized fraud of his agent.'

Pollock and Wilde admit that 'unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal'. *Grant* v. *Norway* (10 C.B. 665) and *Coleman* v. *Riches* (16 C.B. 104) stood in the way of any assertion to the contrary. And the agents' acts, in those two cases, were of a class well within the scope of their functions,[1] so that no Pickwickian sense is to be attached to the word 'implied'.[2] These judges place the principal's liability solely on the ground that he has adopted the contract and got the plaintiff's money. Evidently he could not sue on a contract vitiated by his agent's fraud. How then can he keep money paid under it? That the action to get it back takes the form of an action of tort (deceit) is an irrelevant detail.

And they state the foundation of liability in terms which ought to become classical (p. 184):

'There are, no doubt, many frauds committed by agents which would not bind their principals. But I hold that the statements of the agent which are *involved in the contract* as its foundation or inducement are in law the statement of the principal.'

[1] Captain signing bill of lading without goods on board: wharfman giving receipt for goods not delivered to him.

[2] Cf. pp. 87 *sqq.*, *infra*.

'The relation', added Martin, 'of master and servant is entirely different from that of a principal vendor and his agent or brokers to sell (p. 196).'

In *Jones* v. *Smith* (1867) 16 L.T. 609, an execution creditor was held not liable for the act of a bailiff in levying on the wrong goods without any directions to do so, except general directions to the bailiff 'to do what is right in the matter'. 'And', observes Byles J., 'he does that which is wrong. The defendant cannot be made responsible for the wrongful acts of her bailiff not authorized by her.'

In *Lord Bolingbroke* v. *Swindon New Town* (1874) L.R. 9 C.P. 575, the person whose acts damaged Lord Bolingbroke was in a very singular position. He was the manager of the defendants' sewage farm, and was allowed the most ample scope in dealing with it. Nevertheless, it would seem that he was their servant: in the case, however, he is treated as their agent. And as he had no implied authority to commit trespasses (though certainly he must have had authority to do lawful 'acts of the kind' of that which he unlawfully did), the corporation were exonerated for his interference with the plaintiff's land. That interference was directed solely to the furtherance of the purposes for which he was appointed manager. The case is thus a very strong authority that there is no liability in tort for a mere agent. It was formally rested on the ground that trespass was not within the scope of the agent's authority. But since trespass is certainly held to be within the scope of a servant's authority,[1] the ground is seen to be formal merely.

Two cases[2] on the position of those who employ 'contractors' need careful comparison, as the earlier was

[1] Vide pp. 92 *sqq.*, *infra*.

[2] *Pendlebury* v. *Greenhalgh* (1875) 1 Q.B.D. 36; *Tucker* v. *Axbridge* (1888) 53 J.P. 87.

apparently misunderstood in the later. Both were cases of injury sustained by reason of stones being left on the road unguarded. In the later case of the two the defendants were held liable on the footing that the contractor was their 'servant'. But this is not at all the *ratio decidendi* of the earlier case, on which Pollock B. and Manisty J. rely. The ground taken by Cairns, Coleridge, Bramwell, and Brett is the much sounder one, that the road authority had never devolved on the contractor the duty of lighting and watching his excavations. The work comprised four elements: materials, labour, superintendence, and lighting and watching. Since the contractor only agreed to provide the labour, the authority remained liable to see to the lighting and watching; just as it had (admittedly) retained the superintendence.

There is not a word to the effect that the contractor was a servant, and Pollock and Manisty themselves say that the situation in *Pendlebury* 'is exactly the case here', i.e. in *Tucker* v. *Axbridge*.

It is not therefore sufficient to establish that a wrongdoer was the defendant's agent: it must be shown that the defendant was invested with a general power in law to control him (though he need have no power to control him in fact). When this power of control exists, it follows that the agent is a 'servant' and the liability attaches. The liability for the torts of agents is thus really coeval with liability for servants, from which it is indistinguishable. It is as a servant that the agent entails liability on the principal.

A striking exception certainly appears to occur in the case of solicitors: it is remarkable that the subject of Notarial Liability also occupies a large and special place in French jurisprudence. But we have seen that in *Jones* v. *Smith* (*supra*, p. 40) the liability of the client was strongly disapproved. The early cases, such as *Barker* v.

Braham,[1] seem really to have turned on the ratification by the client of the irregular acts of the attorney.[2] In *Bates* v. *Pilling* (1826) 6 B. & C. 38, the attorney and his agent were acting within their express authority.

The visiting medical officer of a corporation hospital was alleged to be a 'servant' in *Evans* v. *Liverpool* [1906] 1 K. B. 160, and it is by no means so plain to the writer as it was to Walton J. that he was not. 'It would be wrong for them to attempt to control his opinion' as to the discharge of patients, as the learned judge says: still, they could do it, if they chose to take the risk. The doctor could certainly not (strange as are the developments of modern State medicine) force the corporation to eject a patient whom they wished to retain, or vice versa. Suppose they brought in an independent opinion, say that of one of their own number: could they not control their officer?

But when we come to the regular staff maintained on the premises by the corporation, one would expect a different view to prevail. Admitting that the consulting operator is not a 'servant', we should, nevertheless, expect to find a different rule applied to the ordinary staff.

Yet the operators and attendants at a hospital maintained by a corporation (out of what funds is not stated) for charitable purposes are not 'servants' of the corporation *quoad* the carrying out of operations. They are independent skilled persons provided by the corporation, but not under their control while performing this particular duty (*Hillyer* v. *Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820). This seems to be entirely inconsistent with the liability of shipowners for the negli-

[1] (1773) 2 W. Bl. 866.

[2] Cf. judgment of Bramwell B. in *Collett* v. *Foster* (1857) 2 H. & N. 361.

gence of their navigating officers. A shipping company's directorate are not entitled to interfere with the navigation of its vessels, any more than the governors of a hospital are entitled to interfere with the performance of operations. In fact, an ordinary person might in certain circumstances be quite wrong in dictating the course to be pursued by his driver. The fact of the immediate control of proceedings admittedly resting with the operating surgeon, cannot affect the liability of the persons who had the general control, perhaps not of him, but of his assistants. If a doctor is called in to a private house to attend to an accident case, the housemaid and footman are none the less acting as housemaid and footman because they are told to do what the doctor tells them. The case may be supported on the ground that the negligence might have been that of the consulting surgeon alone. For him the corporation probably were not responsible.

The distinction which Kennedy L. J. draws between the professional and the non-professional duties of the staff, holding (it would seem) that they are servants when acting in the one, and not servants when carrying out the other, set of duties, is calculated to lead to great difficulties in practice, and appears to be untenable.

His Lordship appears to make the claim of an injured party against a hospital-owner something arising out of a contract or undertaking on the part of the latter. The liability of an employer for his servants rests on no such undertaking or understanding.

If the august presence of the visiting surgeon took the hospital staff temporarily out of the 'service' (i.e. the control) of the hospital governors, it evidently left them their agents. Perhaps the visiting surgeon was their agent also. No one, however, suggested in the course of the case that the governors might or could be liable for their negligence in that capacity.

We shall see [1] that from the time that the new doctrine of the servant's 'authority' to commit wrongs was accepted (i.e. about 1862), it became inevitable that an attempt would be made to impose a similar liability on principals, who had evidently given a similar esoteric authority. The new doctrine of 'authority' (authority not to perform the servant's work, but to commit wrong in the course of it) was invented in order to make masters, and particularly corporations, liable for acts of wilful trespass, as well as for mere negligence as previously. If once it spread to the case of principal and agent, it would inevitably, though not logically, involve the principal in his agent's negligences in imitation of a master's liability for those of his servant.

That step has not been taken. Principals have been held liable in cases substantially of contract. Principals have been held liable in cases of tort where the agent was also a servant. Principals have been held liable for the wrongs of their agents which they told them to commit. But, fortunately, there seems to be no occasion on which a mere agent has been held to have had 'implied authority' to commit wrongs or to be negligent.

The danger that such a proposition may be laid down is nevertheless imminent.

II. Partners

It has been shown that principals are not liable, as such, for the torts of their agents. The extension of the rule of vicarious liability to principals is only made when the agent is a servant. In this limited sense the rule has always applied to principals.

Its extension to the case of Partners is much more recent and much less legitimate. For the Partner has no power

[1] p. 108, *infra*.

whatever of controlling the acts of his co-partners, or of dictating to them how they shall carry out the business of the partnership. The remaining co-partners are not the masters of the acting partner. They cannot summarily dismiss him if he acts contrary to their directions. The extension to the Partner of the rule as to Servants and Agent-Servants was a helpless surrender to a false analogy.

It was again a driving accident which, by an imperceptible transition, led to the establishment of the principle of the liability of partners for the tort of one of their number.[1] In *Moreton* v. *Hardern* (1825) 4 B. & C. 223, one of a firm of three coach-proprietors drove the coach and ran over the plaintiff. It was held that the co-partners were liable (Holroyd, indeed, suggested that they were answerable ' as the owners ' of the vehicle and horses), but no argument was directed to distinguishing partners from servants.

The recent tendency towards an extension of liability to persons engaging in a joint design which is not a business transaction, is thus based on no historical grounds whatever. It is a careless analogy with the liability of business partners, which liability was itself introduced in this somewhat inconsiderate fashion.

It was not until 1861 that the point again arose. In *Ashworth* v. *Stannix* (3 El. & El. 703) Cockburn C. J., Wightman and Blackburn JJ., adopted the rule of partners' liability for each other's torts, with no reasoning and in implicit reliance on *Moreton* v. *Hardern*.

[1] As long before as 1819 a wine merchant had been held responsible for the false statements of his partner. But this was a case of contract pure and simple: *Rapp* v. *Latham* (1819) 2 B. & Ald. 795. So in *Willet* v. *Chambers* (1778) Cowp. 814; *Jacaud* v. *French* (1810) 12 East, 317; *Bond* v. *Gibson* (1808) 1 Camp. 185. See and compare *Arbuckle* v. *Taylor* (1814) 3 Dow, 160, *infra*, pp. 140, 168, where partners were held not liable for their co-partner's malicious prosecution of a stranger.

This recent doctrine is consecrated by the Partnership Act, 1890, § 10.[1] It is based on an entire misapprehension of the reasons of a principal's liability for the acts of his agent, viz. that they are in the situation of master and servant.

In *Brunswick* (*Duke*) v. *Slowman* (1849) 8 C. B. 317, decided in the interim, it seems never to have been dreamt that Slowman could be liable, without more, for the acts of his partner Baker. These were clearly acts done in the execution of their business as sheriff's officers. Yet an immense amount of argument was expended as to whether or not Slowman had done anything to ratify Baker's illegalities. But this is perhaps attributable to the fact that the seizure was regarded as altogether illegal, and therefore not 'in the course of the employment', under the influence of the theory that a wilful trespass by the servant cannot involve the employer,[2] and therefore that a wilful trespass by a partner cannot involve the co-partners.[3]

[1] Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm [or with the authority of his co-partners] loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

[2] See *per* Byles S. and Bramwell, *arguendo*, at p. 326.

[3] In the Exchequer Chamber, 1721 (*A.-G.* v. *Stannyforth*, Bun. 97), the payment of certain revenue duties was ordered from all the partners who had imported the goods: though one only had been the active agent in the transaction. He had taken advantage of a slip in the custom house to evade duty: there is no question but that the importers were liable. So, five years later—(1726) *A.-G.* v. *Burges*, ibid. 223—the revenue action for treble damages for receipt of smuggled goods lies against any one of the partners concerned. But this does not mean that an innocent partner is liable, but that the penalty is not a joint thing but joint and several. When, therefore, the Chief Baron (Pengelly) says that 'the crown might come against any one of them for the whole penalty, it being in the nature of a tort, and not a contract, as in cases of tort a subject might come upon any one

It does not of course follow that because *A* does solicitor's work for *X*, he is necessarily doing it as partner in the firm *A* and *B*. The co-defendant in *Hasleham* v. *Young* [1] was, however, lucky to get off when his partner had signed a guarantee 'Young & Co.', purporting to give a personal undertaking to satisfy a person who had levied a writ of *ca. sa.* on a client. About the same time (in 1841) it was held in the Common Pleas that one partner has no right to involve another in a trespass. Partners (brewers) being liable as sureties for a canteen-keeper's rent, one of them wrongfully evicted the tenant. It was held that his partner was not involved. 'One partner', says Tindal, 'cannot drag another into a trespass without his previous consent or without his after concurrence.'

Of course there are many cases of partners' liability which really depend on contract. E.g. in 1853 the principle was applied to attorneys, in *Harman* v. *Johnson* (2 El. & Bl. 61), where the distinction was taken that misapplication of money received for investment *generally*

concerned in the tort', he clearly does not mean to assume that an ignorant and innocent partner is liable to an action of tort, but that the liability of tort-feasant partners is *in solidum*. When he adds that it is sufficient if the run goods come into the custody of the accused's agent, he similarly does not mean that a smuggling agent can involve an innocent principal, but that, assuming the principal to be concerned in the guilty intent, it is immaterial whether or not the goods come to his own personal receipt. And so in 12 Geo. II (*R.* v. *Manning*, 2 Com. 616), Comyns says that in *Burges*, 'all the partners acted their parts, and were agents one for another, and chargeable'. 'But suppose' (p. 624), adds the Lord Chief Baron, 'two persons join stock together and buy goods on their joint account, and one is conversant that the goods are run, and the other is not (which was the present case, *for it cannot be intended that Quoif knew the goods were uncustomed, unless it had been so found*, for *fraus non est praesumenda*), I am clearly of opinion that the defendant (Manning) is liable to the treble duty, *though Quoif is not*.'

[1] *Hasleham* v. *Young* (1844) 5 Q.B. 833. Cf. *British Homes Assurance* v. *Paterson* [1902] 2 Ch. 404; *Lloyd* v. *Grace, Smith & Co.*, *infra*, pp. 36–7, 47, 107, 117, 121–6, 134.

was not misconduct within the course of the partner's duties, whereas if the money was received for a *particular* investment, it would be. Here, as in all such cases, it was the holding out of the dishonest partner as a person entitled to receive moneys on behalf of the firm, that was the gist of the action. It has no direct bearing on the general question of the liability of partners in tort.[1] *Ashworth* v. *Stannix* (1861)[2] harked back to *Moreton* v. *Hardern* (1825).[2]

The liability of partners was again considered in 1867, when Stuart (*Sawyer* v. *Goodwin*, 36 L. J. Ch. 578) held the estate of a solicitor liable for his partner's misconduct. But it was again misconduct arising out of contract: and Stuart expressly decided the case on the footing of contract, in order to continue the liability against the estate.

One may note a rather curious case of liability for damage done by a sloop: *Steel* v. *Lester* (1877) 3 C. P. D. 121. The Court was in two minds as to whether the ground of liability was partnership or service. *A* (owner) verbally invested *B* (captain) with the full control of, and management of, his sloop, only stipulating for a third of the profits. Grove and Lindley JJ. held him liable for *B*'s damaging a wharf. Grove laid stress on *A*'s remaining registered 'managing owner', responsible to the public as such (though he had disabled himself from managing); but he also relies on his participation in profits, which the learned judge seems to have thought may have subjected him to the liabilities of partnership, without necessarily making him a partner. This seems an inconvenient result. The proper ground of the decision was, as stated by Lindley, either that the effect of the verbal agreement was not to convert the servant into an independent agent or contractor, or else that a true partnership took place.

[1] Cf. *Bishop* v. *Jersey* (*Ctss.*) (1854) 2 Drew. 143.

[2] *Ut supra*, p. 45.

Blyth v. *Fladgate*, decided in 1891 (1 Ch. 337), was subsequent to the Partnership Act. There was therefore no difficulty in holding solicitor-partners liable for the negligence of their co-partners. This case, however, might well be put on the ground of constructive notice : if the partners had exercised due supervision, they would have found that the co-partner had advised, and had become a trustee under, an improper investment. Equity cases stand on their own independent principles. Reference may be made, for a strictly common-law case where the liability was assumed, to *British Homes Assurance* v. *Paterson* [1902] 2 Ch. 404.

In *Konski* v. *Peet* [1915] 1 Ch. 530, Neville J. held on the facts that the person sought to be charged was not a partner.

CHAPTER III

LIABILITY FOR CO-ADJUTORS AND UNDER-SERVANTS

A. Co-Workers and Associations

We lastly come to the case, after dealing with the Servant, the Agent, and the Partner, of the Co-adjutor.

There is a pressing danger that the false analogy which extended the liabilities of the Master to the Partner may further extend the liabilities of the Partner to the Co-adjutor.

If people are concerned in a common object, it seems to be the tendency of modern thought to hold them liable for everything done in its furtherance. The liability is usually put quite hazily as a liability for the tortious acts of 'the association'. What is meant varies according to the disposition of the individual. Sometimes it is the acts of persons who are engaged in the management of the affairs of the common object, which are supposed to involve liability on the rank and file. Sometimes it is the acts of persons employed by the managers in the furtherance, or purported furtherance, of the common object. Sometimes it is any act done in furtherance of the common object by any of the persons associated together. There is really no reason, except the analogy of a limited company, for limiting the assertion of liability to the acts of the persons who are invested (in law or in fact) with the active management of the common affair. Nor is there the least ground for limiting the liability of any of the co-adjutors to the amount of their subscriptions (if any). The liability either exists *in solidum*,

or it does not exist at all. Whether a limited liability in such cases would be a convenient or proper thing to introduce is quite another question.

So far, in the history of English law, the liabilities of the Partner have not been extended to the Co-adjutor. If people are working together for the same object, that does not make them insurers of each other's conduct. That the common law entertains such a jealousy of combination that tortious acts done in the pursuance of a joint innocent design are regarded as involving the innocent parties in liability, is an error, complete and unalloyed.

The recent development which would actually extend the doctrine of vicarious liability which has been foisted into English law, by making the funds of unincorporated associations liable for the improper acts of those who dispose of those funds, or who are otherwise employed in the execution of the objects of the association, is dealt with by the present writer elsewhere.[1] It need only here be adverted to as the reckless extension of a principle which judges have again and again declared is not to be extended.

As to persons engaged in the execution of a joint design, particularly the ordinary members of clubs and societies, we have the authority of *Brown* v. *Lewis* [1896] 12 T. L. R. for saying that they are not responsible for the torts of one another. At all events, the passive members of an association are not liable for the negligence of the members entrusted with the active management. There is no authority saying that the latter are responsible for each other.

The liability, if it exists at all, must be grounded in active participation in the unlawful acts complained of. And this participation must be proved, and not surmised. If an association exists for an innocent and lawful purpose,

[1] *Westminster Review*, June 1913: 'Trade Union Funds'.

no one is to be supposed to be contributing funds for unlawful purposes merely because such purposes are advocated and praised by the active managers of the association. Nor can they be supposed to do so because there exists a popular impression that money so contributed is used in part for unlawful purposes. Illegality is not to be presumed. Because William Sikes is a bad man, Lady Florence Belgrave is not to be taxed with abetting burglary when she sends him soup.

Let it be repeated, the liability in such cases must be all or nothing. The participation in illegality must be such that the party guilty of it may properly be called upon to make entire satisfaction for all the damage the actual perpetrator may do. There can be no limited liability in such matters. The subscriber cannot compound by forfeiting the subscription. No lax or vague standard of participation, therefore, will suffice. Charges of complicity must be made good by proof, not by surmise. It will not do to say that the defendant might have suspected that the money would be used in tortious ways. There must be both the knowledge and the desire that it shall be so used, before liability can arise. The contribution of a few pounds to a society which has many legitimate expenses cannot be taken to fulfil that criterion. And if it cannot, then there is no liability; and if there is no liability, the subscription cannot be attacked.

Indeed, it is precisely the subscription that can in no case be attacked, paradoxical as it may seem. For it has ceased to be the property of the subscriber: it has become impressed with a trust, the furtherance of the lawful purposes of the association. And to these purposes it must continue to be applied. (See p. 64, *infra*.)

No one ever heard of a trust estate being mulcted for the torts of a trustee. No one ever knew of a customer being held responsible for the consequences of patronizing

a notorious libeller. The participation in a lawful manner in a society having lawful objects cannot be converted into a ground of civil liability because persons actively connected with the organization choose to commit and to recommend illegality.

If there existed evidence which no reasonable person could controvert, that the bulk of the funds contributed were being misapplied in this way, a case of liability would certainly arise if a party were to contribute considerable sums to such a cause. But the mere declaration of the secretary of state that a society is being carried on in an improper way is by no means conclusive. A society may be very objectionable to government officials, and at the same time may be devoting the bulk of its funds to perfectly lawful objects. It cannot be said that a moderate subscription, in such a case, implies any particular support or encouragement of the specifically objectionable features of the organization. It is quite conceivable that a trade unionist might accompany his subscription with a strong remonstrance against rough treatment of non-union men encouraged by the union officials and organs. He could not fairly be called a party to such assaults. Nor can an ordinary subscriber to an association be treated as subsidizing any and every tort which is organized by its managers, however conspicuously and however extensively.

A blind animosity to a ' society '—which really means an animosity to the way in which the society is being managed—issuing in a desire to seize ' its ' funds and to penalize all who support it, is as childish as it is un-English. The society is the embodiment of a lawful and correct idea. Its funds are properly applicable to the carrying out of that idea, and not to the solacement of persons who have been injured by those who have got control of the society's management. It is these latter who are responsible ; and it is against them that the

efforts of the public ought to be directed. Irrational cries for compensation out of the fund which has been so unfortunate as to fall into such hands, are only comparable to the child's desire to thump the table against which he has fallen.

It is very much to be regretted that actions against members of such societies, against the conduct of which prejudice exists, have been facilitated by the operation of R. S. C., Ord. 16, r. 9, which surely was never meant for any such purpose. The circumstances under which each individual member joins, or subscribes to, a society are infinitely various. It is most reprehensible to try their liability behind their backs, by allowing them to be sued and served without knowing anything about it. This result is attained by permitting plaintiffs to bring a ' representative action ' against all, or against certain classes of, the members. Representative actions were never meant to be used in order to enable plaintiffs to get cheap judgments by the gallon. They are only proper where, as in the Chancery practice from which they were copied, the position of the parties who are represented by one of their number is substantially identical. One of ten cousins of a testator, one of fifty creditors of a deceased, may fairly be allowed to represent his class. But nothing can be less proper than to conclude delicate questions of knowledge and intention on the part of members and subscribers by an action brought against one of them of which the rest know nothing.

It would indeed be still more improper, if possible, to hold such a judgment *in terrorem* over them, to be used in order to extort whatever sum a judicial or governmental authority considers commensurate with their moral obliquity.

It is said (An. Pract. 1914, p. 284) to be the practice to allow creditors to sue *in contract*, when debts have been contracted in the name of an unincorporated organization,

making two 'members' of the organization defendants. The enormous dangers of such a procedure are at once obvious. Partners are excepted from it: why should they be, if it was a safe procedure? The two selected 'members' may be collusive, or may not be concerned to defend the action. The person who affected to contract in the name of the organization may have had no authority whatever to do so. Yet the other members may be made liable without even knowing that they are being sued. What, again, constitutes 'membership'? Putting down one's name? Writing a sympathetic letter? There may be an answer to all these questions; but they are exceedingly difficult and delicate. To fix liability without limit on a person, or to fix it within arbitrary limits on a person, as one of the principals of an alleged agent, or as one of the masters (without control) of an alleged 'servant', is a thing which, whatever the 'practice', ought never to be done behind his back.

And so the House of Lords appears to have thought, in *Russell* v. *Amalgamated Society of Carpenters and Joiners* [1912] A. C. 427. 'Such an action as this', says Lord Atkinson L. A., 'is not a representative action such as is frequently instituted in a court of equity. It is a common law action, and I am clearly of opinion that the defendant society cannot be sued in such an action in its registered name. . . . Partners may no doubt be sued in the name of their firm, but that is under [carefully regulated] legislation in the form of the Rules and Orders of 1883.' As to this, Lord Robson L. A. observed that trade unions also were only suable in their collective name under the Trade Union Act, 1871, which accords to them a quasi-incorporation.[1]

[1] In *Wood* v. *McCarthy* [1893] 1 Q. B. 775, a 'representation order' was made in a case of a simple claim under an admitted contract entered into by very numerous (4,000) persons (the 'Amalgamated

If all sorts of loose committees and coteries can be converted into corporations with unlimited liability by allowing 'representative' actions against them, what need was there for any special treatment of firms by Rules of Court and of trade unions by Act of Parliament?

In *Temperton* v. *Russell*[1] the Court of Appeal expressed a strong opinion against deciding questions of tort behind a person's back by means of a 'representative' action. The managers of several trade unions were alleged to be guilty of conspiracy and of inducing the breach of contracts, to the injury of the plaintiff. They were sued on their own behalf and as representing the 'members' of the unions. Esher M.R. and Lindley and Bowen L.JJ. struck the representation claim out of the writ.

'Of course', admit Channell and Lush, *arguendo*, 'it would be necessary at the trial to prove that the *members really authorized the acts of which he complains*.' But in their absence, very slight evidence might evidently be taken as sufficient.

'The truth is', the Court says, 'that this is an attempt to stretch the rule to cases in which it is wholly inapplicable, and the attempt is only plausible by reason of the ambiguity of the expression "some interest". This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending.'

And although this proposition was seen in *Bedford* v. *Ellis*[2] to be too unqualified, 'a common interest or a common grievance' being sufficient whether proprietary or not, Lord Macnaghten L.A. observed of the attempt made in *Temperton* v. *Russell* to sue a horde of subscribers by suing two officials in a representative capacity, that it was 'absurd on the face of it'.

Stevedores' Labour Protection League'). It was 'a beneficial proprietary right' within *Temperton* v. *Russell* [1893] 1 Q.B. 435, and the interest of the members was mathematically identical.

[1] *ut supra*. [2] [1901] A.C. 1.

Lord Lindley's somewhat singular recantation in the *Taff Vale* case (ibid. p. 435) of his judgment, 'now happily explained', in *Temperton* v. *Russell*, need not create difficulty. The *Taff Vale* case was one of a quasi-corporation, empowered to be sued by express statute.[1] The joint authority of Viscount Esher and of Lord Justice Bowen in *Temperton* v. *Russell* is not so easily to be set aside.

It may be very convenient to establish the liability of a crowd of people by suing two or three. But in cases where the mental element is important—where the precise intention with which a subscription was sent, or a signature made, or a promise spoken, may be in dispute—it would work the utmost and the grossest injustice to allow it to be done. This was recognized in *Walker* v. *Sur*,[2] which may well form a landmark in English jurisprudence. Overruling Bucknill J., Vaughan Williams, Buckley, and Kennedy L.JJ. declined to allow a 'representative action' against an unincorporated religious society. The action was one of debt for £500, the amount of an architect's bill, in connexion with the 'Hospital of S. John of God' at Scorton, Yorkshire. The architect sued four members of 'L'Ordre des Frères Hospitaliers de Saint-Jean-de-Dieu', as representing over 1,800 members of the order scattered over France, Germany, Spain, Italy, and elsewhere. The centre of government of the 'order' was at Rome, and the head the Superior-General, assisted by a General Council: the property at Scorton was vested in two of the defendants and other persons. Vaughan Williams 'could not doubt that the intention of Ord. 16, r. 9 was to make easier the bringing of actions against unincorporated aggregates of people'. As a

[1] There was no question here of a 'representation order' under Ord. 16, r. 9. The question was simply whether Parliament had or had not made the trade union an entity capable of being sued.

[2] [1914] 2 K. B. 734.

common lawyer, the Lord Justice naturally could see no other object in it. But Buckley (now Lord Wrenbury), being familiar with the Chancery practice, knew what a representative action was, and what its limitations were.

'If the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At most, an order against these four persons. It is said that these four persons together with many others, making up about 1,800 in all, are members of the society called "The Brotherhood of S. John of God", and that that body of persons, or a smaller number—say 1,000 persons—own property in Yorkshire, and that most or all of the other members of the brotherhood are abroad, and being outside the jurisdiction cannot be reached. The plaintiff says, "I want to have execution against the property in Yorkshire". But when he had obtained his judgment, he could have had execution only against the share of these four persons in that property. There is nothing representative about that.'

His Lordship criticized the language of the rule: but it is submitted, unnecessarily. It makes it possible for the selected few to be sued, or to be authorized by the Court to defend. It does not mean that any such authority is *needed* in order to enable those who are sued (whether by name or by the force of the rule) to defend; but merely that some of them *may*, for convenience and cheapness, be authorized to conduct the defence.

The Lord Justice then proceeded:

'The plaintiff has not asked for any declaration of right as between himself and all the members of a class, which, if affirmed in his favour, could be enforced against individual members of the class. He is only suing for money . . . and he wants to be in a position to say that he is pursuing his remedy against persons who are not parties—in the sense of being [named] parties on the record. It is true that Mr. Lowenthal [plaintiff's counsel] has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party: but that is not the question for our determination. We have to determine whether this action ought to go on so as that execution could be maintained against

all the persons represented. *In my judgment that would be impossible.* It is simply an action of debt against a large number of individuals, and no judgment could be obtained which would be representative against all of them; there could only be a judgment individually against each of them.'

It will be seen that Buckley differed from Vaughan Williams as to the intention of the rule being to facilitate the suit of unincorporated aggregates. He did not (as that judge did) place his decision on the ground of unrepresentative persons having been selected as representative. He placed it on the unrepresentative character of the proceedings. They did not lend themselves to representation.

Lord Justice Kennedy wished that rule 9 was clearer than it was. But he agreed with Lord Justice Buckley.

'This is an action of debt. Such an action, where the persons sought to be sued are members of an unincorporated body which cannot itself be sued, will not lie, framed as this action is sought to be under the authority given by the learned judge. . . .

'When I consider the nature of a money claim, I think the case becomes reasonably clear—because day by day, if this is a large body, one member is going out and another is coming in. The body is continually changing; and to give a judgment against all the members for debt would be to include the case of an incoming member, who would thus be made liable though he was not a member at the date of the contract. And in the case of an outgoing member you would have to take the state of things at the date of the judgment. A judgment could not very well be given against one who had ceased to be a member, and yet these are all supposed to be those persons who are said to be represented. If this order stands, they would (I suppose) be anybody who at the date—I do not know whether it would be at the date of the commencement of the action, or of the judgment—is a member of the Society.'

But apart from that—

'I think an additional difficulty arises in the case of persons whom it is sought to bind by the judgment in

the action—persons who have never been served, and could only be made parties by the exercise of the judicial powers which exist in certain cases under Order XI.' [1]

It will be noted that in this case the bulk of the plaintiffs were foreigners. A ground for distinguishing it accordingly exists. But the judgements of Buckley and Kennedy are clear authorities in favour of the proposition that it is not the function of rule 9 to subject persons to execution who have never been served with process. It is indeed perilously like a departure from Magna Charta to do so. Great is convenience; but a scrupulous fairness in the administration of justice is greater.

Kennedy L.J. laid stress on the fact that there were in this case no funds vested in trustees, as there were in the *Taff Vale* case. This remark gives colour to the idea that where a fund exists, it can be made liable for contracts and vicariously for torts by suing the trustees. And since the persons having the custody of an association's funds or subscriptions are usually trustees of them, this would afford a means of making an association's funds available in most cases. The fallacy of the proposition is shown by the fact that in this very case land in Yorkshire was apparently held by some of the named defendants (*inter alios*) on trust for the objects of the 'Order'. The existence of a trust does not incorporate the trust fund, or make the beneficiary liable *pro tanto* or otherwise for what the trustee may do. No such principle of the limited liability of *cestui que trust* is known to Equity. No such principle of their unlimited liability has ever been hinted at.

As was remarked above, in the *Taff Vale* case [2] there was no question of binding miscellaneous individuals by a 'representative' suit brought against a few of them.

[1] As to foreign service.

[2] *Supra*, p. 57. [1901] 1 K.B. 170; A.C. 426.

The sole question was whether Parliament, in creating a trade union with power to hold and manage property, had clothed it with the capacity to sue and be sued in its own name, like a corporation, and to be liable to the extent of its funds, like a corporation. The decision, though the Lords were obviously much influenced by the existence of the funds, did not formally turn upon it. The root of the decision was the parliamentary organization (if Lord Lindley will not let us call it the incorporation) of these bodies. Given the parliamentary organization, it was an argument in favour of one particular construction of it, that the union might possess enormous funds. But such an argument is quite out of place, where there is no such parliamentary document to construe. In short, it was a case 'depending on the true construction of the Trade Union Acts, 1871 and 1876'. It has no bearing on the general principle.[1]

In Scotland a voluntary association has been held liable for alleged slanders issued by a servant in the course of employment.[2] The law of Scotland, however, has always recognized the personality of voluntary combinations such as firms. It concedes to them a capacity of rights and duties without any necessity for formal incorporation by the State. The law of England is entirely different. A judgment against a voluntary association in Scotland is a judgment against a definite entity which has property. It does not appear to affect the members or adherents in their private capacity, as an English judgment

[1] Even so, it is conceived that it was wrongly decided, and that the argument of the now Viscount Haldane ought to have prevailed. The Lords read into the statute words which were not there, but which they thought ought to have been.

Ellis v. *National Free Labour Association* [1905] 7 F. 629. A similar course seems to have been taken in England in *S. Bendle & Co.* v. *United Kingdom Alliance*, affirmed on appeal April 28, 1915; but the point was not raised. In *Wilson* v. *Queen's Club* [1891] 3 Ch. 522 an unincorporated association seem to have taken a conveyance and defended an action for an injunction.

must unless it is to be subjected to an entirely arbitrary limitation at the pleasure of the judges.

By far the most important and clear pronouncement on the liability of principals and co-adjutors (as distinct from masters) is the judgment in *London General Omnibus Co.* v. *Booth*, delivered in 1894. A horse was frightened by the band played by minstrels belonging to the so-called 'Salvation Army' under the general directions of the defendant. The frightened animal damaged an omnibus of the plaintiffs; they sued the defendant, and a county court judge's deputy gave them £2 12*s*.

'There is really no evidence at all', said Charles J., 'that these persons were the servants of the defendant.' 'There is no evidence at all to support the action against the defendant', said Wright J.

It will be observed that neither judge thought it worth while to advert to the possibility of the bandsmen being the agents of the defendant, blowing within the scope of their authority. Nor did they think it necessary to refer to their co-operation with him in the work of evangelization by cornet.

B. Liability of Committeemen as Masters

It should be noted that it is not always safe to treat committees and other bodies of managers as necessarily occupying the position of masters, even if the general body of persons interested in or subscribing to the organization cannot be so regarded. There is no magic in the word 'committee' or 'council'. It is the fact of personal control which is decisive. Because a person does not resign his membership of a managing junta when he is outvoted, it by no means follows that he remains responsible for what the majority decide, or for what its officials do.

The attempt was made in *Hall* v. *Lees* [1904] 2 K.B.

602, to make the committee of a voluntary association liable for the negligence of certain nurses. It failed because the nurses were obviously in no sense its servants : it simply hired them out, requiring them at the same time to conform to its regulations. The occasion did not therefore arise of measuring the liabilities of the persons who supported or managed the institution. The managers (' committee ') were made the defendants : and the head-note is incorrect in saying that the defendants were an association. Collins, Stirling, and Mathew L.JJ. treat the liability (if existing at all) as the liability of the members of the committee. They do not seem to think that the casual body of so-called ' members ' and subscribers could possibly be in the position of ' masters '.

C. Liability of Servants for Under-Servants

In 1868 the question arose of the liability of directors of a company for the forbidden acts of their company's servants. The case is very badly reported (*Betts* v. *De Vitré*, L. R. 3 Ch. App. 431). It was one of infringement of patent. Says Chelmsford C. :

' [p. 438] The infringement of a patent is a tort, and all persons who are in any way acting towards it are jointly answerable. . . . [p. 442] I will assume that the disobedience was secret. But granting all this, I should still hold the directors would be liable. A master is responsible for all [1] the acts of his servant which are done in the execution of his duty. . . . The alleged infringement of the plaintiff's patent took place in the company's works and in the course of the performance of the proper duties in which the workmen were engaged. Those who have the control of the working are responsible for the acts of their subordinates [2] . . . if there was a violation of their orders, whether openly or secretly, the directors are liable for the consequences.'

[1] As to trespasses, &c., vide pp. 67, 78 *seq.*, *infra*.

[2] Therefore a foreman is liable in the same way as an employer !

This is a startling doctrine and isolated. The men were not the servants of the directors, but of the company. Cf. p. 102, *infra*.

D. Liability of Trust Funds.

There is one case in which trust funds have been made liable, not indeed for the acts of trustees, but for the acts of the latters' servant (*Bennett* v. *Wyndham*, 1862, 4 De G. F. & J. 259). Lord Romilly was strongly against the decision, the report is meagre, and the principal party interested in repelling the claim was willing to admit it. So far as it goes, the case is an authority for the proposition that a trustee may be indemnified for loss caused by the acts of his own servants, as for other trust expenses. But it was expressly laid down that: (1) the trustee must be absolutely blameless in the matter, and (2) he must himself be the actual employer of the wrongdoer. In the case of societies it can only rarely be the case that these conditions are fulfilled. The secretary is not the treasurer's servant: nor the committee's servant. Cf. p. 196, *infra*. In *Heriot's Hosp.* v. *Ross* (1846) 12 Cl. & F. 517 Lord Cottenham said: 'It seems to have been thought that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, and justice, and common sense.' 'If there had been a wrong committed by the charity trustees . . . an action can be maintained [against them]; but if there had been trust funds in the hands of those [trustees] those funds would not have been answerable. Damages are to be paid from the pocket of the wrongdoer, not from a trust fund.'

CHAPTER IV

CORPORATIONS AND QUASI-CORPORATIONS AS MASTERS

The full extent of Holt's doctrine was not immediately realized.

It was long dubious whether it extended (*a*) to corporations, (*b*) to cases of wilful trespass, (*c*) to cases of fraud.

It seemed improper to charge corporations with acts which they could not commit, being outside those purposes for which they were incorporated ; and it seemed impossible to impute to masters the consequences of fraud, that being a tort which depends entirely on a mental attitude personal to the tort-feasor. Also, the rules of pleading made it difficult to charge a master in *case*, when the cause of action could not be case so far as the servant was concerned : yet it seemed, and proved, impossible to charge him with a *trespass* which was not his.

A. Corporations

The question of the liability of corporations for the acts of their servants was accidentally settled by *Smith* v. *Birmingham Gas Co.* in 1834 (1 A. and E. 526). This was an action of trover : the corporation had had the benefit of the servant's tort, and were held responsible. According to Bacon (Abr., 'Corporations', 43 (c)), 'trespass lies not against commonalties . . . but against the persons who did it, by their proper names '. Yet in 1842 the Common Pleas brushed this aside, and on the mistaken analogy of *Smith* v. *Birmingham*, held a corporation liable in

trespass also (*Maund* v. *Monmouthshire Canal Co.*, 4 M. & Gr. 452). There is a great distinction between trespass and trover, which Tindal perhaps failed to apprehend.[1] Yet in both these cases the corporation had had the benefit of the servant's act, and naturally, by some process or other, it was right to compel them to account for it.

Nevertheless, a corporation is established for lawful purposes, and is not endowed with the power to do wrong. It seemed illogical, therefore, to impute to it the wrongs committed by its agents. Yet, when the proceeds of the wrongdoing had been applied to its lawful purposes, it seemed equally illogical, and more unjust, to say that its funds should not be applicable to make good the loss to the injured party. It might have bought his timber ; if its servants have taken and used it, it surely ought to pay for it ? This argument, if closely examined, only justifies holding the corporation liable when it has been enriched by the tort. It is the technicality of English procedure which made it almost inevitable that the liability, once recognized, should be recognized in all cases of tort, whether the corporation had been enriched or not. Technicality for some time favoured the entire exemption of corporations from suit. They were not empowered to answer charges of wrong.

In 1842 an indictment was allowed against a corporation for non-compliance with an order of justices to do certain statutory works (*Reg.* v. *Birmingham and Gloucester Ry. Co.*, 3 Q. B. 223). Difficulties arose as to pleading : a plea of two directors only was refused. Ultimately the case was removed into the Queen's Bench, and a plea by attorney entered. Littledale J. ' never heard of such an indictment '.[2]

[1] Cf. *Horn* v. *Ivy* (21 Car. II), 1 Vent. 47.

[2] It had, however, occurred in 1811 (*R.* v. *Stratford on Avon*, 14 East. 348—non-repair of bridge). And in 1812 the same judge (Ellen-

In *Reg.* v. *Gt. N. of Eng. Ry. Co.* (1846) 9 Q. B. 315, the corporation was successfully indicted for nuisance. We have said hard things of Holt. Let us now gladly record that his opinion at p. 559 of 12 Modern Reports stood in the way of this decision : ' A corporation is not indictable, but the particular members of it are.' And counsel touch the core of the controversy when they point to the liability of individual corporators who have actually done or authorized the deed : ' Are they to be punished twice, once as individuals, and once as members of the body corporate ? ' The Court, per Denman C. J., in giving judgment against the corporation, rely solely on the admitted criminal liability for non-feasance,[1] as established by the cases just cited, and on the alleged principle that ' there can be no effective means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority '. This curiously-involved sentence leaves us in doubt whether it is not the ' majority ' who are properly the subjects of indictment ; but it is unprofitable to analyse confusion of thought such as this.[2]

In *Chilton* v. *London and Croydon Ry. Co.* (1847) 16 M. & W. 212, the point was apparently not taken : but in 1851 (*Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314) the novel doctrine was extended obiter to trespass of which the proceeds were not in the company's hands, and this on the ground of ratification ;[3] and thereafter the only question is as to whether the servant was in fact

borough) upheld a plaintiff in trover against the Bank of England : *Yarborough* v. *B. of England* (1812) 16 East, 6.

[1] Evidently, even if a corporation has no power to do positive wrong, it cannot be deprived of the power to do negative wrong : it cannot be prevented from doing nothing ! [2] See a valuable note, 7 Harv. L. R. 45.

[3] In point of fact, the Court held that there was no evidence of ratification, and dismissed the claim.

acting within the scope of his employment.[1] In 1853, for instance, trover was allowed against a railway company for the act of their general superintendent, in spite of a gallant attempt by Mr. Hardinge Giffard to show that he was acting outside the scope of his functions.[2]

Still the liability was not yet extended to torts which require malice, express or implied. Trespass may be committed in perfect innocence of all idea that the rights of another are being infringed. The person who works a horse may perfectly reasonably believe it to be his own, and yet be committing a trespass by his act. But libel,[3] slander, and malicious prosecution require at any rate full knowledge of the circumstances, and sometimes an actual impropriety of motive.

So much is said of Bramwell's judgment in *Abrath* v. *N. E. Ry. Co.* that a corporation cannot be liable for a malicious act, that it is important to observe that he was by no means alone in that opinion. Baron Alderson expressed the same view in *Stevens* v. *Midland Counties Ry. Co.* (1854) 10 Ex. 352—an action for malicious prosecution. 'In order to support the action it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind.' Baron Platt told him that that argument was a very weak one. Baron Martin held that even a private employer would not have been liable. (The prosecution was initiated by the company's superintendent, for stealing the company's tarpaulin.[4])

But in 1858 Campbell C.J. and the Queen's Bench found that a corporation could be responsible for a libel.

[1] Cf. *Roe* v. *Birkenhead, Lancashire and Cheshire Ry. Co.* (1851) 7 Ex. 36.

[2] *Giles* v. *Taff Vale Ry. Co.* (1853) 2 El. and Bl. 822.

[3] In libel, since *Artemus Jones's* case, it may almost be said that one speaks and writes at one's peril, as in trespass (*Hulton* v. *Jones*, [1910] A. C. 20). It may be hoped that this case will be duly 'distinguished' in the near future.

[4] Cf. the cases on prosecution, *infra*, pp. 96 sq., 104 sq.

It was put on the bare ground of convenience. 'Instances might easily be suggested where great injustice would be suffered by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed.'[1] It does not appear precisely how the defamatory words came to be published. The Court had no difficulty in imputing the shadowy 'malice' which is implied in the innocent repetition, as telegraphists, of a false statement, to the corporation. And in 1859 Erle C.J. and the Common Pleas in *Green* v. *L. G. O. Co. Ld.* (7 C. B., N. S. 300) found that a corporation could be liable if its servants maliciously obstructed the omnibuses of a rival (this being conduct connected with the corporation's business). (They had a fortnight previously declined to hold an unincorporated firm liable for similar acts done on the part of their drivers against their express orders.)[2] The corporation was thus held liable for torts committed with express malice (i. e. improper motive).

In *Abrath* v. *N. E. Ry. Co.* (1886) 11 A. C. 247,[3] it was held that there was no absence of reasonable and probable cause for the prosecution of the plaintiff, who was accused as a surgeon of conspiring to obtain heavy damages for one McMann. It is worth while setting out Lord Bramwell's further opinion that such an action cannot lie against a corporation:

'My Lords, I am of opinion that no action for malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. It must be shown that there was malice or

[1] The reporter (*Whitfield* v. *S. E. R. Co.*, E. B. & E. 115) cites the cases of quo warranto under the Stuarts as showing that corporations can harbour malice (cf. 8 How. St. Tr. 1039, 1305, 1309: 2 Kyd, *Treatise on Corporations*, 474, who, however, denies the possibility).

[2] *Green* v. *Macnamara* (1859) 1 L. T., N. S. 9.

[3] See also *The Abrath-McMann case* ('I will show the N. E. R. that... Gott verlässt keinen Deutschen' (God never forsakes a German).

some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive. If the whole body of shareholders were to meet, and in so many words to say, "Prosecute so-and-so, not because we believe him guilty, but because it will be for our interest to do it", no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors even, by resolution at their board or by order under the common seal of the company, were maliciously to order a prosecution, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires* —they would have no authority to do it.

'I say, therefore, that no action lies, even if you assume the very strongest case; namely, that of the very shareholders directing it, or the very directors ordering it, —because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive.'

His Lordship distinguishes the cases in which corporations had been held liable for trespass and libel: in these no express malice was necessary. Lord Fitzgerald took occasion to say that he had 'often heard it observed that corporations are certainly very frequently without conscience, and sometimes very malicious'. What his Lordship 'had often heard' is scarcely impressive as a proposition of law: it is mere popular shorthand for the fact that those who actually direct the proceedings of corporations are apt to dispense themselves from the moral standards of individuals acting on their own behalf.

An echo of the older doctrine that a corporation's funds cannot be liable for the consequences of torts which it has no power to commit is to be found as late as 1887. In *Brit. Mutual Bkg. Co. Ld.* v. *Charnwood Forest Ry. Co.* (18 Q. B. D. 714), (a case of fraud) it is said that Manisty and Mathew absolved the defendants upon the ground that they were a corporation. The same notion is really at the root of Bowen's judgment on appeal. 'The fraudulent

answer could not be within the scope of the "agent's" employment, for the company *had no power* to bind themselves by the consequences of any such answer.' (Ibid. p. 718.)

The doctrine of a corporation's liability was again asserted in a case of libel in *Citizens' Life Assurance Coy. Ltd.* v. *Brown* [1904] A.C. 423. Lord Lindley, if it may so be said, begged the question at issue, by remarking that '*if* it is once granted that corporations are for civil purposes to be regarded as persons, i. e. as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals'. *If* it is once granted! *Ashbury Carriage Co.* v. *Riche* shows that it is impossible to grant it. And if we do grant it, why stop at 'civil purposes'?

'To talk about imputing malice to corporations', proceeds Lindley, 'appears to introduce metaphysical subtleties which are needless and fallacious . . . the company are liable for [the libel] on the ordinary principles of agency.'

But that was the very question in dispute. Do the principles of agency (or rather of service) make the employer liable for the wilful and malicious acts of his employee? It had long been doubted [1] whether they did so in the case of an individual, who *could* be guilty of malice and wilful misconduct. But could the same be said when the employer, being a helpless creature of law, could not, by the law of its being, commit a wrong?

It is a very different question. The Legislature, when it created such beings, laid down the limits of their capacity. Unlike Milton's deity, it meant to create beings without the capacity for wrong. It did not mean (in other words) to make the subscribed capital liable for some official or

[1] Cf. *per* Tindal, C.J. in *McLaughlin* v. *Pryor* (1842) 2 M. & G. 58—'no servant can make his master a trespasser against his will'.

officials' misdeeds. But the vital question of substance is passed over by the Judicial Committee as 'metaphysical subtlety which is needless and fallacious'.

Brown's case is not law in England; no doubt at the present moment it would be followed: whether it will be followed in future depends on whether legal opinion realizes in time the distinction between metaphors and reality.

So far as malicious prosecution is concerned, the employer's liability was somewhat summarily established by *Cornford* v. *Carlton Bank* [1900] 1 K. B. 22, so that in *Bradshaw* v. *Waterlow & Sons, Ltd.* [1915] 3 K. B. 527 the point was not raised.

B. Quasi-Corporations: Statutory Administrators of Funds

It makes no difference that the corporation has no funds except such as are to be used for a statutory public purpose. By creating the fund into a juristic person the Crown or the Legislature implies that the legal obligations of a person are to be discharged by the fund. Ordinary incorporation by Royal Charter or by Statute carries this implication. Virtual incorporation by the creation of a body to administer the fund with liability to be sued in a single name, and with liability limited to the fund, or with an indemnity against the fund, appears perhaps to do so likewise, though the cases are contradictory.

The House of Lords (reversing the Court of Session) found in 1834 that Road Trustees were not liable (*Duncan* v. *Findlater*, 6 Cl. & F. 901; Macl. & Rob. 911), nor was the fund which they administered liable, for the negligence of their employees the roadmen. In this case, however, the local Act (2 Gul. IV, c. 32,[1] § 16) in conjunction with the

[1] *Sic* in report: I cannot trace the statute, but no doubt it follows the lines of 1 and 2 Gul. IV, c. xxxviii.

general Act (1 & 2 Gul. IV, c. 43, §§ 2, 101) provided an express remedy against the surveyors, contractors, and employees, enacting that the road fund was to be applied towards the maintenance and upkeep of the road *and to no other purpose whatsoever*. The Court of Session held the trustees liable *quoad* the funds in their hands. It was urged by the Attorney-General and the Lord Advocate, on the authority of *Harris* v. *Baker*[1] and *Hall* v. *Smith*,[2] that this was clearly wrong in England, and could not be right in Scotland : Lords Cottenham and Brougham took the same view.

In these last quoted (English) cases, the commissioners or trustees were *quasi* incorporated by being made suable by their clerk, but it does not seem to have been considered that their liability was limited to the funds administered.[3] That limitation appears to have existed in the case of *Duncan* v. *Findlater* (1 & 2 Gul. IV, c. 43, § 16). Both Acts in terms only indemnify the clerk (the nominal defendant) out of the trust funds for ' the expenses of process ', or the ' costs and charges ' to which he has been put. It seems always to have been understood that this includes damages awarded. (In *Hall* v. *Smith* these are expressly mentioned.) How far there is a personal liability if the fund is inadequate, may be a question.

Harris v. *Baker* is badly reported. *Hall* v. *Smith* shows Best C. J. as absolving the commissioners on the ground that ' they are charged with the execution of a public duty, for the performance of which they receive no emolument or advantage. . . . The commissioners cannot be expected continually to watch such persons as [their surveyor and contractor].' He added, ' The doctrine of *respondeat superior* is bottomed on this principle, that he

[1] (1815) 4 M. & S. 27. [2] (1824) 2 Bing. 156.
[3] See per Best C. J. at p. 160.

who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.' Brougham laid down the competing principle (of *control*) in *Duncan*: 'The rule of liability, and its reason, I take to be this, I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion.' Blackburn (in *Mersey Docks* v. *Gibb* (1873) L. R. 1 E. & I. 115) explains *Hall* v. *Smith* as turning on the ground that the Trustees employed an independent contractor: but surely their own surveyor was their servant, and it was through his negligence that the injury happened. His interpretation of *Duncan* is severely criticized by all the judges in *Virtue* (*infra*).

The report of *Duncan* v. *Findlater* is much better in Macl. & Rob. than in Cl. & Fin.[1] The former sets out the important § 117 of the general Act, regulating the bringing of the suits contemplated in § 101, and enabling the Court to pronounce such orders and decrees as the justice of the case shall seem to them to require, *having due regard to the funds of the trust.*

Lord Cottenham's decision, however, obviously turned very largely on the fact that Lord President Hope had too broadly laid down that the road trustees would be liable (*quoad* the fund) for (not only the negligence, but) *all* improper conduct of the roadmen, 'though wholly unauthorized by the trustees, and though unconnected with their employment'.

Extending (apparently) *Duncan* v. *Findlater* to the sphere of contract, the Court of Exchequer held that the Maryport Harbour Trustees were not liable for the alleged negligence of the harbour-master, nor for the congested

[1] See per Inglis L. P., in *Virtue* (1873) 1 R. 295.

condition of the dock.[1] (The words 'and for no other purpose whatsoever' in connexion with the mode of application of the funds do not occur in the local Act concerning the Trust.) But in 1858, in *Ruck* v. *Williams*, the Exchequer decided that the Cheltenham Improvement Commissioners were liable for the negligent construction of a sewer; and that the liability was personal, with a suggested indemnity against the rates. (*Hall* v. *Smith* unfortunately was not cited.) But, as explained by Erle C. J. and Byles J. in *Holliday* (*infra*), the board had directed the improper act by resolution, both in this case and in the other two cases cited in the note.[2] The personal intervention of the commissioners can clearly be of decisive importance in these cases where they are not incorporated. The liability must, if it exists, always be theirs in the first instance: it is a subordinate question whether they have an indemnity against their funds. Thus their personal intervention, the liability being theirs, was sufficient to dispose of these cases. Cf. p. 64, *supra*.

And where they were *not* directly involved, in *Holliday* v. *St. Leonard's, Shoreditch* (1861) 11 C.B., N.S. 192, a parish vestry acting gratuitously was absolved from the consequences of the negligence of workmen employed under them to repair a street. This case is explained by Blackburn on the inexplicable ground that the workmen of 'a public body' are apparently to be distinguished from those of a body which makes profits like Dock Trustees.

Holliday v. *St. Leonard's, Shoreditch*, therefore remains an authority for the statement that a quasi-corporate body is not liable for its servant's negligence, apart from contract.

[1] *Metcalfe* v. *Hetherington* (1855) 11 Ex. 257, 5 H. & N. 719.

[2] *Southampton and Itchin Bridge* v. *Southampton Local Board of Health* (1858) 8 E. & B. 801, followed by the Exchequer in *Ruck* v. *Williams* (1858) 3 H. & N. 308, and in 1861 by the Common Pleas in *Whitehouse* v. *Fellowes* (1861) 10 C.B., N.S. 765.

A different principle was applied to the Fen Commissioners in *Coe* v. *Wise* (1866) L. R. 1 Q. B. 711, when they were held liable to respond for their employees' negligence in the performance of an *absolute* statutory duty (non-maintenance of a sluice). They had no funds : so what precisely the plaintiff expected to get out of the action it is difficult to see. Yet more generally it is now laid down that when funds allotted for a particular public or charitable purpose are clothed with the character of actual incorporation, then, just as in the case of funds subscribed for profit, they are available for the redress of injuries done by the employees of the managers. This is supposed to have been established by *Mersey Docks Trustees* v. *Gibb* (1886) L. R. 1 H. L. 93. The principle, so stated, seems quite at variance with that of the earlier cases, though it might be possible to distinguish them on the wording of the various Acts of Parliament. But clearly the case does not support the supposed principle. The action was (as Lord Neaves says in *Virtue*[1]) one of contract. Probably the best authority for the liability of public bodies in tort remains *Brownlow* v. *Met. Bd. of Works* (1863) 13 C. B., N. S. 768—the defendant body was here incorporated and had a common seal (18 & 19 Viet. c. 120, § 43).

Three cases on the liability of public bodies to pay local rates (*Mersey Docks Trustees* v. *Jones, Same* v. *Cameron, Clyde Trustees* v. *Adamson*) had a powerful influence in bringing about the decision in *Mersey Docks Trustees* v. *Gibb*, which reversed the whole current of authority. In those cases the Exchequer was reversed by the Exchequer Chamber and the House of Lords. Lord Wensleydale, but for them, would have dissented in *Mersey Docks* v. *Gibb*.

The Mersey Docks Trustees v. *Gibb* (L. R. 1 E. & I. 91) was held in Scotland by a majority to have overruled

[1] (1873) 1 R. 295.

Findlater v. *Duncan*, in *Virtue* v. *Alloa Police Commrs.* (1873) 1 R. 285. But the House of Lords cannot overrule its own decisions, and *Findlater* can be justified on the very special words of the roads clauses (referred to above, p. 72).[1] Inglis L. P. ironically observes that the Scots rule, which was characterized in 1839 by Cottenham C. as scarcely 'justifiable by the laws of Scotland or by the laws of any civilized country', and by Campbell as 'contrary to all reason and justice', had virtually been accepted in 1866; and the alternative English rule characterized as 'unsound and mischievous', and 'likely to lead to very great evil and injury' by the same tribunal! And the dissenting judges (Cowan, Neaves, and Deas) carry great weight. Neaves observes that the case of the *Mersey Docks Trustees* is purely one of contract. Lords Benholme and Jerviswoode, who concurred with Inglis, were probably persuaded by his commanding influence. Lord Moncrieff took the same side; but both Inglis and himself deal with the cases too much as abstract affirmations of propositions, and without regard to the particular circumstances adverted to by Lords Neaves and Cowan.

Coe v. *Wise* (*supra*, p. 74) is notable in the history of the subject, in that the Exchequer Chamber[2] upheld Blackburn as against Cockburn and Mellor.

[1] See *per* Lord Cowan, *Virtue*, *ut supra* (p. 299): 'I am not satisfied that the *Mersey Docks* case . . . presented the same state of circumstances as occurred in *Duncan*, and in this case, viz. the entire devotion of the trust funds by the statute to the purposes of the trust.'

[2] Erle C. J., Willes J., and Channell and Pigott, BB.

CHAPTER V

DELIBERATE TRESPASS, ETC. OF SERVANT. 'AUTHORITY' TO COMMIT WRONGS

(i) General Doctrine

It is well known that in English law a person commits all direct interference with property 'at his peril'. However reasonable, however careful, his act, if it damages, or even touches, the property of another, it is a technical wrong—trespass.[1] Should such damage *indirectly* result from his conduct, then he can only be made liable by showing that there was some element of unreasonableness or negligence in what he did—the remedy here is not trespass but 'an action on the case'.[2] The distinction between direct and indirect injury is very nearly that between the subjects of the *actio directa* and the *actio utilis* or rather the *actio in factum*. And, like the *actio in factum*, the comparatively modern action 'on the case' is much more elastic and pliable than the common law and ancient action of trespass.

It is obviously difficult to draw a strict line between case and trespass—between direct and indirect injury. If *A* has his hand on the tiller of a vessel and unskilfully steers her in a particular direction which brings her into collision, perhaps against his desire, is the injury a direct trespass, or is there only an action on the case for failing to keep the ship straight? The answer might be vital in the old days of pleading. It was of no avail to sue in case if the injury was a direct trespass; and vice versa.

[1] Unless justified by particular excuses.

[2] '*In consimili casu*,' under the statute of Westminster II.

It therefore came to be asked what was the exact nature of the action against a master for his employee's wrongdoing. It could not be a new form of action. Setting fraud and other rare actions aside, trespass or case it must be. Two theories were possible. It might be held that the ground of the master's liability was implied carelessness in appointing a careless servant. The action would thus always be case, and it could only lie when the servant had been careless. If the servant's act was proper and careful, though an invasion of a third party's rights (i.e. a trespass), no action against the master would, on this theory, be competent. Or it might be held, without presuming any artificial carelessness on the part of the master—which, after all, is only one of a dozen competing theories—that the master would be liable for his servant's trespass and negligence alike, the only difficulty being as to the form of action. If the servant's act was a deliberate trespass, could it be charged against the master as a trespass directly though vicariously done by him, or could he be charged in case as having indirectly brought it about ?

Naturally, we assume that the trespass was committed by the servant within the scope of his employment, i. e. with an eye to the accomplishment of his duties (though, it may be, the improper and disobedient accomplishment of them). The common illustration is that of a carriage-driver extricating himself and his equipage from a collision or its consequences by striking, or driving against, the horses and carriage of a stranger. For trespass committed for his own private ends, or in the course of his own private undertakings, the servant is of course alone responsible.

But was the master to be responsible for his non-negligent trespass at all ?

It was difficult, thought the Common Pleas in 1795, to put a case where the master could be considered as a

trespasser for an act of his servant which was not done at his command.[1] So that the choice lay between rejecting all liability for acts of wilful trespass and allowing it to be framed in case.

The controversy is not unimportant to the history of vicarious liability. The whole question of whether the master was liable for deliberate and careful acts of the servant was bound up with it. Such acts, causing physical damage, were trespasses. How could the master be sued for the trespass of another? How, on the other hand, could case lie for what was obviously a trespass, when there was on the part of the defendant no real negligence or impropriety conducing to the injury? The eighteenth-century authorities are instances of negligence on the part of the servants—either case or negligent trespass. Holt's imaginary carmen did not deliberately run over boys and burst wine-barrels. Nor did the servants in *Michael* v. *Alsetree* make their horses knock down passengers. The liability of the master for a deliberate act of the servant still remained an open question; and it might well have been repudiated up to an advanced era in the nineteenth century.

The point has arisen less frequently than might have been expected; and this for two reasons. It is very easy, in the first place, to discover some element of negligence or unskilfulness in the servant's improper and wilful act; and this, though it might not enable the servant to be sued in case as well as in trespass, is sufficient to implicate the master under the ordinary doctrine.[1] In the second place, it is equally easy, if it is desired to exonerate the master, to declare that in committing a wilful wrong the servant, though acting in his master's supposed interests, was travelling outside the scope of his employment.

[1] *Morley* v. *Gaisford, ut infra*, p. 82; cf. ibid. p. 443.

[2] See *Croft* v. *Alison, infra*, p. 85.

Judges oscillate between the notion that an illegal thing resembling the lawful things that a servant was employed to do must necessarily be within the scope of his functions, and the view (exemplified most clearly in the Scots courts) that to do an illegal thing is evidently to step outside his employment. So, Judge Cowen (in *Wright* v. *Wilcox* (1838) 19 Wendell, 346) represents Judge Reeve as doubting whether the master would not be liable in trespass, if the servant did a wilful wrong in the immediate performance of his master's business. And he answers that doubt by declaring that 'the law holds such wilful act a departure from the master's business'. Here the theory of agency is reconciled with the theory of non-liability for trespass by the same unsatisfactory doctrine of estoppel as is invoked in England to reconcile the theory of agency with the doctrine of liability for forbidden acts.[1] Lord Cottenham seems to put forward the same view in *Duncan* v. *Findlater* (1839) Macl. & Rob. 935:

'The law as laid down [by the Court of Session] would amount to this: that [road funds] are liable . . . for the improper conduct of any person when engaged in any operation performed under the authority of the road trustees. *That the conduct of such person was not in due execution of the purposes of the Act constitutes part of the proposition, for otherwise it would not be improper.*'

The uncertainty as to whether the master would be liable for the servant's wilful trespass as well as for his negligence, and whether the form of action against the employer in that event were properly case or trespass, arose in an acute form towards the end of the eighteenth century. In *Savignac* v. *Roome*[2] (1794) 6 T. R. 125, the King's Bench, presided over by Kenyon, refused to allow case to be brought against the master for the servant's trespass. The Common Pleas (though not dissenting)

[1] *Infra*, pp. 88, 97. [2] Cf. *Day* v. *Edwards* (1796) 6 T. R. 648.

held that the ordinary occurrence of negligent collision was in itself case rather than direct trespass. It is the horse, or the breeze, which is the active agent (*Morley* v. *Gaisford* (1795) 2 H. Bl. 441; *Huggett* v. *Montgomery* (1807) 2 N. R. 446).[1] And in *Ogle* v. *Barnes* (1799) 8 T. R. 188 the King's Bench—(though in *Day* v. *Edwards* (1794) 5 T. R. 648, Kenyon seems to have considered reckless driving a cause of trespass, and so did Lord Ellenborough in *Leame* v. *Bray* (1803) 3 East, 593)—came to the same point of view. It was still thought (*McManus* v. *Crickett* (1800) 1 East, 106) that the wilful trespass of a servant could hardly be within the scope of his employment. It was not until 1821 (*Croft* v. *Allison*, 4 B. & Ald. 590) that this possibility was admitted.[2]

In *McManus* v. *Crickett* (1 East, 106), Kenyon C. J. decided that a servant who wilfully drove his master's coach against another person's chaise did not make his employer liable to the latter even in trespass. Kenyon distinctly adopted Rolle's artificial reasoning,[3] and declared that the delinquent, by his improper conduct, acquired a special property in the coach—made it his own for the moment—and absolved the employer from the use that was so made of it. He treats Holt's illustrations of the spilt wine and the run-over child as actual cases, and points out that case, and not trespass, is the proper remedy in such circumstances.[4] As Lord Kenyon had

[1] Lord Bramwell's opinion in *Holmes* v. *Mather* (1875) 10 Ex. D. 261, which Clark and Lindsell seem to adopt at p. 7 of their work on Torts, is that a negligent act, provided it is sufficiently direct in causing injury, is a trespass. This seems on the whole contrary to these authorities, though in accordance with *Day* v. *Edwards* and *Leame* v. *Bray*. From a note in 2 H. Bl. 442, it appears that Ellenborough was of opinion that in cases of direct injury by negligence (c. g. driving on the wrong side of the road in the dark) the plaintiff might bring trespass or case *at his option*.

[2] Probably by Abbott C. J., Bayley, Holroyd, and Best JJ.

[3] p. 23, *supra*.

[4] Cf. *Brucker* v. *Fromont*, *supra*, p. 28.

already (in *Savignac* v. *Roome*)[1] declined to allow case against the master for the wilful trespass of the servant, it is clear that by his reasoning the master could not be liable for the servant's wilful trespass at all.

So, again, in *Bowcher* v. *Nordstrom* (1 Taunt. 568), a seaman on the defendant's ship, under the pilot's directions cut away part of the boom of the plaintiff's vessel, in order to disentangle the two. This was trespass, and as the captain had done nothing to countenance it, the plaintiff was non-suited.

So the matter stood for another fifty years.

In *Lyons* v. *Martin* (1838) 3 N. & P. 509, the Queen's Bench upheld a non-suit directed by Coleridge J., where a master was sued for his servant's trespass in distraining a horse, *quasi* damage feasant, on the highway. Denman observes: 'In the cases of negligent driving, the defendant has been held responsible for the conduct of his servant in doing a lawful act negligently, but here the act is altogether unlawful.' Littledale, Patteson, and Williams concurred.

In *Lewis* v. *Read*[2] the same is declared by Parke, Alderson, Rolfe, and Platt. Bailiffs employed to effect a particular distraint had been given express instructions to take nothing except what was on the premises. They mistakenly went beyond their limits, and took a stranger's cattle. This was a trespass in the course of their employment, and in their employer's supposed interests. Had it been mere negligence, there seems little doubt that he could as their master have been liable. But, the act being a wilful trespass, it was held that the employer could not be liable unless he ratified it with knowledge—or that he chose, *ex post facto*, without inquiry, to take the risk upon himself and to adopt the whole of their acts (including the receipt of the proceeds). The same doctrine had been

[1] p. 81, *supra*. [2] (1845) 13 M. & W. 834.

substantially declared by Littledale at nisi prius in 1831.[1] There is a presumption that the landlord would be liable for what his agent did : but this he can rebut. If his agent retains the distress, the landlord cannot rebut the presumption by simply referring complaints to the agent.

The idea persisted even in 1849. So great a judge as Parke stated [2] that the employer was only liable for the servant's negligence and the like. For a skilful and careful act, though a trespass, the master could not be liable. ' In all cases where a master gives the direction and control over a carriage or animal or chattel to another rational agent, he is only responsible in an action on the case, for want of skill or care of the agent—no more.' The theory that was so soon to arise, that the servant has ' implied authority ' to commit all kinds of skilful and lawful trespasses in the execution of his functions, was utterly unknown to Parke. In *Gregory* v. *Piper*[3] he had applied the doctrine of implied authority within its proper limits : i. e. to involve a master in the natural and probable consequences of his specific commands. He was not ignorant of the principle. But he declined to open the flood-gates of its indiscriminate and general application.

In *Gordon* v. *Rolt* (1849) 4 Ex. 365, an independent sub-contractor was interposed. Yet the dicta of Alderson and Parke are valuable. Alderson says : ' To render the master liable to trespass, it must appear that he ordered the servant to do the act.' Parke observes : ' If a servant, in the course of his master's employ, drives over any person, and does a wilful injury, the servant, and not the master, is liable in trespass ; if the servant by his negligent driving causes an injury, the master is liable in case.'

The rule by that time was well established that case

[1] *Hurry* v. *Rickman*, 1 Moo. & Rob. 126.

[2] *Sharrod* v. *L. & N. W. Ry. Co.* (1849) 4 Exch. 585.

[3] (1829) 9 B. & C. 591, *infra*, p. 113.

was the only remedy against the master in any event (except that of a direct command), and was so stated by the learned Baron: *Sharrod* v. *L. & N. W. Ry. Co.* (1849) 4 Exch. 585.

The liability of the employer for the deliberate acts of his servant seems to have been introduced in the special case of corporations. All the earlier reported cases of trespass are cases of trespass by the servants of companies. It may still be an arguable question whether liability is not special to them, in view of the very strong dicta of judges of the highest eminence to the effect that a deliberate wrongful act, though committed in the employer's interest, cannot involve him in responsibility. In *Croft* v. *Allison* (1821) 4 B. & Ald. 590, the act, though a trespass, was certainly negligent, and the form of the action was case. The case is badly reported; but it seems not to have been the direct act of trespass on the part of the coachman—striking the plaintiff's horses—that was the gist of the action, but the consequential damage which happened to his chariot. The striking, though an independent trespass, was, beyond and beside that, a piece of negligent coachmanship. At least, it might have been; and it was left to the jury to say. There is nothing in *Croft* v. *Allison* inconsistent with the general doctrine of non-liability for trespass, *qua* trespass.

Perhaps it is too late now to question the universal applicability of the new dogma, which indisputably, as we shall see, applies to companies. Yet, if the possibility remains open, it is obviously of great importance. A servant may be in accidental difficulties from which he sees fit to extricate himself, in his master's service, by doing considerable damage. Parke would plainly have absolved the master in such a case, and there appears to be no instance in which a natural person has been held answerable as employer in such circumstances. The

servant may form a very imperfect estimate of the gravity of the damage which he is doing (a consideration which particularly applies in cases of defamation and malicious prosecution), and it is arguable that when the master is an individual, and not a corporation, which is bound to act by agents, and cannot exercise its own judgment, he ought not to be bound 'by his servant's uninstructed election to trespass'.

The common law doctrine was enunciated clearly, emphatically, and almost for the last time, in the Exchequer in 1857.[1] The keeper of the Sun Inn at Ely found a sweep in his bar. He asked him to leave and wash; and on his refusal, he called in two constables to turn him out. As he resisted ejection, they used considerable violence and broke the sweep's leg. Holding that the ejection was justified, and that the constables were acting as the landlord's servants, Pollock C. B. nevertheless entered a non-suit, on the ground that for their excessive violence they were solely responsible. On motion for a new trial, when *McLaughlin* v. *Pryor* was cited, Pollock adhered to his ruling. Bramwell drew the established distinction between negligence and trespass.

'It may be that [the master] was responsible not only for the acts of his agent done pursuant to his authority, but perhaps also for a negligent execution of his orders; as, for example, if in carrying the man out, they had negligently knocked his head against the door-post. But it is contended that he is responsible for a trespass. The answer to that is, that the trespass was not committed in pursuance of any authority, nor was it a negligent performance of anything authorized. I entirely subscribe to what is laid down in *Freeman* v. *Rosher*[2] and *McLaughlin* v. *Pryor*.[3] A man may be responsible as a trespasser for the act of another, as in *McLaughlin* v. *Pryor*, where the jury found that he had authorized the particular act. On

[1] *Pigeon* v. *Legge* (1857) 5 W. R. 649.

[2] (1842) 4 Man. & Gr. 48.

[3] (1849) 13 Q. B. 780.

the other hand, suppose a master tells his servant to turn a boy off the wall of his garden, and the servant is aggravated and . . . gives the boy a box on the ear, it is clear the master would not be answerable for that ; so neither is the defendant answerable for the violence used by the policemen when exasperated by the resistance of the plaintiff. There is this dilemma : either there was no excess, or the excess was in the nature of a trespass.

Watson agreed :

' Probably no trespass was committed : but if there was, the defendant is not answerable for it. I agree with my brother Bramwell, that the defendant might probably be liable in case of an injury by the negligent performance of his orders : but what is charged here is a distinct act of trespass.'

Even in 1859, the same was held by Erle C. J., Williams, Crowder, and Byles JJ. (*Green* v. *Macnamara*, 1 L. T., N. S. 9).[1] This was a case of conspiracy to ' blanket ' the plaintiff's omnibus. ' These acts were clearly wilful acts done by the men contrary to the orders of their masters.'

(ii) The Fiction of Implied Authority to Trespass

But it was so convenient to hold companies liable in trespass for deliberate acts, that it was soon done.[2] The technical justification was the invocation of the fiction of ' implied authority ' : exactly the same fiction by which the introduction of the general principle of liability for a servant's negligence had at times been supported. In effect this was to reduce to a nullity the rule maintained in 1849 by Parke and Alderson that a master cannot be liable for his servant's wilful trespasses. So long as they are within the scope of the employment, he is supposed to

[1] Williams, Crowder, Byles JJ. and Erle C. J.

[2] A statutory liability was cast upon cab proprietors for the acts of their drivers by 6 & 7 Vict. c. 86, ss. 10, 24, 27, 28. Cf. *Venables* v. *Smith*, L. R. 2 Q. B. D. 279.

have given 'an implied authority' to commit them. This is practically (though by no means logically) to equiparate trespasses to negligence, and to make the employer liable for both alike. Clearly, when Parke (in *Sharrod*) speaks of a 'direct' authority, he does not mean a fictional and implied authority flowing from the nature of the servant's occupation.

It is, however, a consequence of basing the master's liability on an assumed 'implied' authority, that no liability can exist when the master has given express orders not to commit any trespasses. We have seen that no such express orders will protect him against the consequences of his servant's negligence. That liability does not formally rest on any implied authority: and no withdrawal of authority can diminish it. But in trespass it may be different. Judges have expressly placed the liability on this footing—conscious that it can be placed on no other. Unless, therefore, we are to bar the defendant from proving that the servant had in fact no such authority,[1] express instructions to avoid trespass must be a defence.

Every railway or tramway company can therefore defend itself from the consequences of its servants' wilful and non-negligent trespasses against the persons whom they arrest or elect to injure, by proving that in fact instructions had been given them to avoid touching persons or property without legal justification. If not, the foundation of their liability is a sorry fiction indeed.

Whether this view is correct or not, the new development by which an employer who has given no such express denial of authority to trespass is held liable on an implied authority to do so, is very inconsistent with all judicial utterances prior to 1850. An express authority to trespass

[1] The tendency is actually to do this, under the respectably-sounding name of 'estoppel': vide *infra*, p. 97.

of course makes the master liable : and it would be going too far to say that an equally direct authority might not be implied. But a wholesale implication of such authority from the nature of the servant's employment is tantamount to holding the employer liable for trespasses committed within its scope, and (except for the effect of a direct negative instruction) the distinction so much insisted on by the older judges disappears.

The attempt was thus made to put the master's liability on a parallel with the liability of a principal to carry out his agent's contracts. It was declared openly that the ground of the master's liability was the 'authority' which he was supposed to have given the servant to do the act complained of. And when it was urged that a master could never be supposed to have given his servant authority to do wrongful acts, it was replied (after the manner of the Wolf to the Lamb) that at any rate he had given him authority to do that *class* of acts.

There was never a more dangerous hypothesis. A coachman has, in a sense,[1] 'authority' to decide which of two turnings he shall take on a dark night. But so long as he was skilful and careful there was never any idea prior to 1860 of holding his master liable if his decision landed him in a trespass. Besides, the doctrine of 'implied authority' applies logically to the casual hirer—who, as we know, is exempt from liability.

The attempt was not, I think, made from any scientific desire to reduce the two principles of master's liability

[1] 'Authority' is relied upon by Cockburn in *Patten* v. *Rea* (1857) 2 C. B., N. S. 612 in this sense. It was not a case of trespass, so that there was no need to invoke the idea of authority to commit the wrong, and all that was decided was that it was within the scope of the servant's employment ('authority') to collect his master's debts when driving in his own gig on his own private business. So used, the term is simply equivalent to 'employment'; and Blackburn appears so to use it in the transition period of *Seymour* v. *Greenwood*.

for torts and principal's liability for contracts to a common head ; nor should I be disposed to refer it to any benevolent desire to invest the former principle with a moral sanction which it so conspicuously lacks. Its real motive was to enable the rule of vicarious liability for deliberate tort to be applied to corporations. These were constantly being held liable on their agents' contracts, because of their authority. If the same principle of 'authority' could be invoked, there would be nothing to prevent them from being liable for their servants' torts : and, of course, as much for their trespasses as for their negligences.

At any rate, the principle, when once taken up by Blackburn, was vigorously wielded.

Prior to 1860, companies had in one or two cases been held liable for deliberate torts of which they retained the proceeds, and in 1851 this had been expressly put on the ground of ratification.[1] But the liability was now generalized.

Perhaps the strongest impulsive force in the direction of the new doctrine was the case of *Limpus* v. *London General Omnibus Co. Ltd.* (1862) 1 H. & C. 526. It was a case of negligence : and of negligence very clearly committed in the course of the servant's employment. The judgment carries the law no further. It is the dicta of Willes which are so important. Disregarding the Biblical injunction against seething the kid in its mother's milk, Willes used a casual expression of Parke's to justify doctrine which must have horrified him in the serene retreat to which, as Lord Wensleydale, he had been called. In *Huzzey* v. *Field* (1835) 2 C. M. & R. 432, the judgment delivered by Lord Abinger is said to have been the work of Parke. It was not a case of trespass or libel, but the somewhat special tort of alleged disturbance of ferry. On the ground that the act of the servant was exactly what the master

[1] *Eastern Counties Ry. Co.* v. *Broom* ; *vide infra*, p. 67.

had employed him to do, it was held that the master might have been properly found liable in the action. And Parke (or Abinger), dismissing the point curtly, and without elaborating his words, observed that there was no question about the liability, as the servant was acting in the course of his master's service, and for the benefit of the master (to whom he paid over the fare). Here we have at any rate ratification ; and as the master asserted, and in the event successfully maintained, that the voyage was no infringement, we have also almost certainly a case of express authority. The growing importance of Pembroke had induced him to set up a ferry across Milford Haven. He gave his servants a general direction to ferry passengers across the harbour,[1] and one can scarcely suppose that he could have been taken to have excepted from that instruction a route which he believed himself entitled to use.

Parke's judgments in *Sharrod* v. *L. & N. W. Ry. Co.* (*supra*, p. 85), and other cases, show that his lordship cannot have meant more than this : that in committing the alleged infringement the servant was doing the very thing he was told to do.

But in *Limpus*, Willes seized on this chance phrase and expanded it out of all knowledge. 'A master is liable for *acts* done by his servant in the course of his employment. . . . Lord Wensleydale [Parke] laid down, in *Huzzey* v. *Field*, that the proper question is, whether the servant was acting at the time in the course of his master's service, and for his master's benefit : if so, his act was that of his master although no expressed command or privity of his master was proved.' Yes : but 'the proper question' in what class of cases ? The case before Parke was one of

[1] It had been argued that he only directed them to ferry from one particular (innocuous) point to another ; but this is contradicted by counsel on the other side.

a servant doing the very thing he was ordered to do, not of a servant electing to do a wrongful act of a class which he was employed to do rightfully. At any rate, it was a thing which the master had adopted, and the cash benefit of which the master had pocketed. It will be noted that there is an ambiguity even in the word 'benefit'. Parke speaks of a realized pecuniary benefit: Willes of a prospective and hypothetical advantage.

In *Limpus* v. *London General Omnibus Co. Ltd.*, as we have seen, Willes's gloss was not necessary to the decision. The case was not one of wilful trespass. The defendant's driver certainly did not collide with the plaintiff's coach on purpose. But cases soon multiplied in which negligence was not the gist, and in which Willes's wide words were eagerly relied on.

Every 'act', Willes had said, of the servant's (not 'every negligent and unskilful act') involved the master. The difficulty was to find a logical justification for this: for it evidently went beyond the received principle. Justification was found in the doctrine of 'implied authority'.

It will be seen that this new ground of liability established to meet the case of trespasses, is totally different from the old basis of liability in the case of negligence. The old basis does not rest on any authority to be negligent, but on authority to do the work. The new rule rests on a supposed authority to commit wrongs at discretion in the progress of the work. The question is not, as in the former case, Was the negligent act done with a view to the furtherance of the work?—but Was the tortious act implicitly foreseen and allowed by the employer?

Just as the introduction of the general doctrine may be attributed to the eminence of Holt, so this startling new twist may be attributed to the eminence of Blackburn. We shall find it concurrent with his advent to the Bench.

I do not mean that it had not been adumbrated before

his time. *Roe* v. *Birkenhead, Lancashire, and Cheshire Ry. Co.* (1851) 7 Exch. 36, was a case of which we shall find many examples. It was one in which a station superintendent took the responsibility of arresting a passenger for a breach of the by-laws of a railway. Unlike so many subsequent cases, the present one ended in judgment for the defendants: and that not on the ground that (as in *Poulton* v. *L. & S. W. Ry. Co.*) there was no power to arrest in such circumstances at all, so that the superintendent could not be supposed to have been implicitly authorized to exercise his discretion as to effecting captures—but on the ground that the superintendent had in fact no such authority, express or implied.

Such a doctrine of 'implied authority' to commit useful trespasses seems, as we have seen, quite incompatible with the principle that a master is not liable for his servant's wilful trespasses. A special authority to commit a particular trespass of course renders the master liable. But it is quite a different thing to say that a general authority to make proper arrests confers an authority to make improper ones which turn out to be trespasses. At any rate, it involves the consequence that an express order forbidding tortious arrests must override the supposed implied authority, and relieve the employer from all liability. An implied authority to commit torts and crimes is a juristic monstrosity.[1]

The doctrine of 'implied authority' to trespass was not really involved in *Seymour* v. *Greenwood*.[2] Blackburn speaks at length in that case of the 'implied authority' of an omnibus conductor. But the case was again, as in *Limpus*, one of negligence, and what Blackburn really means here by 'implied authority' is 'implied employment'. It was argued that when an omnibus guard was

[1] See *per* Russell in *Holmes* v. *Mather*, L. R. 10 Ex. 261, *infra*, p. 112.

[2] *Seymour* v. *Greenwood* (1861) 6 H. & N. 359, 7 H. & N. 335.

removing an inoffensive passenger, supposing him to be offensive, he was committing a trespass, and that therefore his employer would not be responsible. Blackburn remarks that it is immaterial in any view whether it is a trespass or not. For the guard's employment is to eject persons whom he thinks offensive, and if he performs this act (trespass or not) his master will be liable for negligence in the performance of it. Unfortunately, he by no means makes his meaning obvious; and it is very easy to draw the conclusion that he was laying down the general rule of liability for a servant's trespasses.

The case was that of a Manchester omnibus proprietor. His guard had broken the plaintiff's skull, by throwing him out of the omnibus before a passing cab. The plaintiff declared in case, and of course the verdict obtained by him stood. The defence urged that this was a simple trespass committed by the servant: but it was not. The plaintiff had been drinking, and the guard was entitled to put him out. He did so negligently and improperly, and, in accordance with the established law, involved the master.[1] The judgments in the Exchequer proceeded on the question of negligence. Pollock says: 'I think, then, that there was evidence that the servant was executing his master's command, but *with a want of care and consideration*.' Martin says: 'If the guard used *unnecessary* violence, the defendant, his master, is responsible . . . a great deal has been said about the act being purely a trespass; but it was nothing more than the guard of an omnibus putting out a person who had misconducted himself'—[i.e. a negligent performance of a lawful act]. Channell had left the court; but he had taken the same ground in the course of the argument—'Would it not have been negligence if the guard had [without any possibility of trespass] taken the plaintiff

[1] Cf. *Smith* v. *N. Met. Tram. Co.*, *infra*, p. 104.

out of the omnibus and left him, drunk, in a crowded thoroughfare ? '

But in the Exchequer Chamber, Blackburn harped on the question of 'authority', with which the question has nothing whatever to do, as had been pointed out by Martin. The judgment begins, properly enough, by stating that there was evidence that the guard, acting in the course of his service, was guilty of excess of violence not justified by the occasion, and relies on *Croft* v. *Alison*.

The judgment, however, went further: and further than it need. It would have been sufficient to decide the case[1] on the grounds taken in the Exchequer.[2] It will be observed, however, that Blackburn in this case refrained from saying that the servant had implied authority to throw passengers whom he judged offensive in front of cabs. He only said that the servant was acting within the scope of his authority when he exercised his discretion and decided to eject the passenger. In other words, he used the term 'authority' as an equivalent for 'employment'.[3] But he soon went further.

[1] *Quære* whether the process of concealment from the master of his delinquency or disobedience would be considered as 'the course of the employment', if injury was done in the course of it. The servant's extrication from a dangerous position into which he has carelessly put himself might clearly be so.

[2] The doctrine of trespass *ab initio* has no bearing on the case. For it does not matter that the servant's excess of violence may have made him personally a trespasser. For the servant's negligence or unskilfulness, whether it is embodied in trespass or not, the master is liable in any event.

[3] This use of the word 'authority' goes back to the days of Holt. It is objectionable, as confusing the 'employment' of a servant with the 'authority' of an agent, and as suggesting that the ground of the master's liability is that he gave authority for the unlawful or negligent act. Cf. its use by Cockburn C. J. in this sense in *Patten* v. *Rea* (1857) 2 C. B., N. S. 612, *supra*, p. 89.

In *Giles's* case (1853) 2 B. & S. 822—the assumed foundation for many of these decisions—the matter was one of trover arising out of contract. Substantially the question was one of contract and agency. Yet in *Goff's* case (1861) 3 E. & E. 672, Blackburn, without any pretence at argument, observes that 'the same principle is, we [1] think, applicable to all exigencies that may naturally be expected to arise in the ordinary course of the business of the Company'; and in *Poulton* v. *L. & S. W. Ry. Co.* (1867) 8 B. & S. 616, he mainly relied on *Goff*. He indeed there absolved the defendants, whose servant had arrested the plaintiff, because the arrest was so plainly unjustified, even if the facts had been as the servant supposed them, that it could not be said to be within his 'implied authority' to effect it. There was no power, under the company's by-laws, of arrest in such circumstances at all.

A very unfortunate distinction was thus created. Some acts are done clearly outside the employment. Others are done in the course of the employment—connected with it, and involving the master in their consequences if they are negligently done. But other acts, though done, as this act of the stationmaster's was obviously done, in the course of the employment, do not involve the employer unless there is something more—the concession of implied authority to commit them. Between the last two classes, there is a distinction without a difference. The attempted distinction is a mere expedient for bringing wilful torts within the net of vicarious liability, from which judges up to 1850 had been careful to exclude them.

It is a principle which, if it was really applied as a working rule, would work very awkwardly. For it leaves it to the discretion of the judge to say whether the act

[1] Mellor and Shee sat with him.

was a routine act which the servant had authority to commit, however wrongful, or an act which was so indelicately tortious as to be outside the contemplation of a reasonable employer or director.

In point of fact, in all these cases of wilful tort by servants, the master is by a stupid fiction made liable as a joint tortfeasor, which is not the case when the servant's tort is negligent.

In *Allen* v. *L. & S. W. Ry. Co.* (1870) L. R. 6 Q. B. 65, the L. & S. W. Ry. Co., as usual, were fortunate. An arrest—i.e. a trespass—for alleged attempt to steal, after the attempt had ceased, was held not to be within the scope of the servant's 'implied authority', as it could not then be necessary for the protection of the employers' property. This reasoning seems inadequate on the face of it: there are very many things done in the course of employment which are not, and could not be, necessary.

Yet Blackburn, putting the matter on the artificial footing of 'implied authority', remarks: 'It may fairly be said that the booking-clerk has an implied authority to do all acts which are necessary for the protection of the money entrusted to him.[1] I am inclined to think that if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender'; he adds that it might also be within his authority to arrest if he thought he could get the money back by that process. But he holds that there is no implied authority 'to punish the offender'.

It is surely in the master's interests to hold a thief,

[1] Note that this is a very limited proposition, and falls far short of implicating the master in all that the servant may judge necessary or think fit.

even if no pecuniary benefit is to be gained by it. But as masters were now to be held liable for deliberate trespasses, some decent limitation had to be introduced. Mellor and Lush concurred, and Hannen thought that 'it would lead to very grievous consequences if it was established that a servant had always authority to put the law in motion with reference to any offence that may be committed against the property'—which, with respect, was not the proposition put forward by the plaintiff.

There is a patent fallacy in Blackburn's reasoning. The clerk may have an implied authority to do all acts which are necessary. But it does not follow that he has an implied authority to do all acts which he thinks are necessary. The often-quoted illustration of a driver striking a third person's horse in order to extricate his conveyance from a difficulty is apposite in this connexion. Admittedly he has no 'implied authority' to do such a careful and proper act of trespass.

It is clear that we have now travelled a long way from the days of *Huzzey* v. *Field*, when the general direction to take fares across Milford Haven, coupled with acquiescence and the receipt of fare in a particular case, was held to make the master responsible as a possible joint tort-feasor. He is now alleged to be liable as a joint tort-feasor because the servant does some act of trespass of a kind which he probably might have approved or allowed.

In *Van der Eynde* v. *Ulster Ry. Co.* (1870–1) I. R. 5 C. L. 6, 328, a ticket-collector and a station-master effected an arrest on suspicion of stealing a ticket from the office. It is not surprising that the judges took very different views. George J. thought the servant could have no implied authority to effect arrests outside the provisions of the company's by-laws. Fitzgerald J. thought they might, if their object was to protect the company's

property, and to recover the ticket. O'Brien J., on the other hand, held that the arrest was really not effected for stealing the ticket at all, but under a by-law making arrests permissible in cases of attempts to evade the payment of fare. And Whiteside C. J. agreed with this: 'It does not follow, because the act of taking the ticket might be technically described by lawyers as a felony of a bit of parchment, that the attempt to travel without paying the fare was not made, or intended to be made, and was not the thing believed by the officers of the company to have been the design of the plaintiff.' Or, as Fitzgerald B. more tersely put it on appeal: 'I am at a loss to see how an attempt to travel without paying one's fare becomes less such because the means employed are stealing a ticket.'

In the Exchequer Chamber this view was adopted by Pigot C.B., Fitzgerald B., Hughes B., Morris and Lawson JJ. Monahan C. J., Pigot and Lawson further maintained Fitzgerald J.'s view that there was implied authority to recover the ticket by arrest. *Edwards*[1] and *Allen*,[2] observed Pigot, have no application when the supposed theft is committed by taking property out of the servant's immediate charge. Allen's was an alleged *attempt* to steal, Edwards's was an alleged theft of what was not in fact the company's property.

The liability in trespass was again put on the ground of 'implied authority' in *Moore* v. *Met. Ry. Co.* (1872) L. R. 8 Q. B. 36—a case of arrest by a station-inspector for non-payment of excess fare. It was held that this was a matter which *was* committed to the discretion of the station-inspector, and that the company was liable for his mistaken exercise of it—*per* Blackburn, Mellor, and Lush.[3]

[1] *Edwards* v. *L. & N. W. Ry. Co.* (1870) L. R. 5 C. P. 445.
[2] *Allen* v. *L. & S. W. Ry. Co.* (1871) L. R. 6 Q. B. 65.
[3] Reversing his opinion at nisi prius.

Then there arose a case which is one of the few which are not cases of wrongful arrest.[1] A zealous porter pulled a passenger out of a moving train, under the impression that it was the wrong one.[2]

It was pleaded, however, that the act was a wilful trespass by the servant. And it could not be within his 'authority'—his strange 'authority' to commit illegalities which in the late twenty years had become recognized as implied in the constitution of railway companies. For the company's by-laws contained no provision for the ejection of passengers from the wrong carriage.

Yet because the porter was clearly acting within the scope of his employment, which included the duty of seeing that passengers did not travel in wrong trains, the company were held liable for his wilful trespass! What possible difference was there between the porter's act, and that of the engine-driver in *Sharrod* (*supra*, p. 85) who drove over the plaintiff's sheep? Kelly C. B. completely (and excusably) misapprehends the principle. 'Where a servant is acting within the scope of his employment, and in so acting does something negligent *or wrongful*, the employer is liable even though the acts may be the very reverse of that which the servant was actually directed to do.' The words italicized are pure assumption, though natural assumption. Martin made the same erroneous assumption: 'We must be governed in deciding this case by the general principles of the law of master and servant, and it is quite immaterial what the by-laws of the company were.' The case may be right, for all that, for the porter was perhaps negligent, and an action might have lain in case. And Blackburn was careful to

[1] *Bayley* v. *M. S. & L. Ry. Co.* (1872) L. R. 8 C. P. 148.

[2] In *Hanlon* v. *G. & S. W. Ry. Co.* (1899) 1 F. 559 a similar violent act on the part of a porter was held in Scotland to be negligent and to involve the employing company (cf. *Bryce* (1898) 6 Sc. L. T. 68).

take this ground. 'Where a servant, acting within the scope of his employment, does an act *negligently*, or with *excessive* violence, the master is responsible for the consequences.' Mellor, Lush, and Cleasby concurred, but Pigott thought the case one that was very near the line.

'Considerable violence' was again used in *Lowe* v. *G. N. Ry. Co.* [1893] 62 L. J. Q. B. 524, to eject a passenger improperly from a train. Mathew and Wright allowed an appeal from a non-suit, holding that 'a railway porter, particularly when supported by a station-master, must have authority to remove passengers misconducting themselves or travelling improperly in certain carriages'.

On the older authorities, it is not a question of what authority they 'must' have, but of what authority they did have. Because they have authority to eject people who are acting improperly, it does not follow that they have a general discretion to eject anybody they bona fide think ought to be ejected. Possibly the case can be supported on the ground that they behaved carelessly in the execution of their duties.

In 1884[1] Stephen J. held in a considered judgment that a company were liable for the trespass of their tram-conductor, who gave a passenger into custody on a charge of passing bad money. The company had power to arrest in case of attempts to evade payment of fares, and since the tender of bad money involves such an attempt, it was held that the authority to arrest covered the case, although the actual charge preferred was a more serious one. The 'authority' to effect lawful arrests was interpreted as an authority to effect whatever arrests the conductor thought fit.

A case almost precisely similar was *Charleston* v. *Lond. Tram. Co.* (1888) 32 S. J. 557, where Esher, Lindley, and Lopes held on the facts that a conductor, in

[1] *Furlong* v. *S. Lond. Tram. Co.* 1 Cab. and El. 316.

effecting an arrest, was not detaining the plaintiff for attempting to evade payment of fare (which the company were authorized to do [1]) but for attempting to pass bad money [2] (which they were not). Consequently, there could be no 'implied authority' to do what the company had no power to do. Stephen J. had directed a verdict for the plaintiff, but Mathew and Charles JJ. had reversed this, on the ground that the conductor was not authorized to arrest even for non-payment of fare.

A case arose out of the once-celebrated 'Kinsella' incident, when a man named Kinsella was shot by a bailiff in Ireland, in the course of carrying out an illegal distress. His son sued the land agent, under whose direction the bailiff was acting.[3] It was held that there was no evidence that the agent had authorized the distress to be made in an illegal manner, and that the illegal manner in which it had actually been effected [4] did not make the defendant liable. Palles C.B. laid down the proposition that the express authority of an agent includes not only the act authorized, but 'everything necessarily *or reasonably* incident to the performance of that act'; further, that where the relation of master and servant exists, the master *may* be liable, even though he directed the act to be done in a legal manner, and the cause of action is not the act itself but the illegal and unauthorized mode of its performance. He did not think that the relationship between the agent and bailiffs was one of master and servant (*Stone* v. *Cartwright* [5]). He did not advert to the distinction between negligence and trespass, but proceeded into an inquiry into the

[1] § 52, Tramways Act, 1870 (33 & 34 Vic. c. 88).

[2] This was the charge stated by the conductor.

[3] *Kinsella* v. *Hamilton* (1890) 26 L. R. I. 671.

[4] Under a warrant to levy £57 when £55 was all that was due: and after the tenancy had technically been transferred.

[5] (1795) 6 T. R. 411.

bailiff's 'authority' to slay, and graciously found none, express or implied; in which finding Andrews and Murphy JJ. concurred.

The awkward principle of 'authority' was again adopted in *Barry* v. *Dublin United Tramways Co.* (1890) 26 L. R. I. 150. Probably the servant there made no arrest, and the case may be supported on the ground that, even if he did, it was not in the execution of his functions. He was a roadman, placed to exclude the public from a street under repair. It was going beyond exclusion, to arrest or to charge passengers. O'Brien J., however, adopted the formula of 'authority' coupled with the implication of 'authority to determine when a case for the exercise of the authority arises'. As there could be no implied authority to do what the company had no power to do (namely, effect arrests), the company was relieved, as in *Poulton*. But it is an extraordinary perversion to hold that a company can give authority to arrest innocent persons under a power to arrest guilty ones, and yet cannot give authority to arrest a person whom it can only prosecute. In point of fact, it is not a matter of 'authority' at all. The corporation is liable, as Esher says (p. 104, *infra*), on the ground of the relationship of master and servant. The servant does what he is not 'authorized', and could not be 'authorized', to do. But he does it in the course of his employment and not with any private object of his own: and the company is liable accordingly, whatever its wishes or powers.

Holmes J. in *Barry* speaks of 'whether an act was within the scope of the employment of a particular servant; in other words, whether authority from the master to do the act could be implied'. This is to equiparate two totally distinct things: the authority to do a lawful act, which entails liability for unauthorized acts negligently done in the execution of it, and the

instruction to do an unlawful act which entails liability for the act perpetrated in accordance with it.

Where a conductor rushed a passenger off a tramcar because he did not at once produce his fare, the company was held liable,[1] in accordance with the case of *Allen*. Cave had non-suited the plaintiff, on the ground of want of authority in the conductor. Lord Esher observes: 'Clearly, the dispute which took place was in the course of the conductor's employment. If so, although the conductor acted negligently, illegally, and improperly, his masters are liable for what he did. *The question is not one of authority.* It is a case of master and servant, and all the decisions on the subject show that where that relationship exists, the master, whether a corporation or an individual, is responsible for acts done by the servant in the course of his employment, even though done wrongfully, illegally, and against express directions.' This shows that the case was regarded as one of negligence and not of trespass at all. The conductor had a right to evict the plaintiff, and he evicted him with reckless and unnecessary violence. Esher uses the word 'negligently'; and the necessity of declaring in *trespass* or *case* having been abolished, the form of suit was immaterial.

It is not like the case of a driver taking upon himself to strike a stranger's horses, or to do some other act, which he has no right whatever to do. Here the conductor was justified in the eviction. But he carried it out with a negligent disregard for consequences, exactly as in *Seymour* v. *Greenwood*.

Barmen, equally with ticket-clerks, appear to enjoy large opportunities of arrest. A very similar case to that of *Hanson* v. *Walker* (*infra*) was one of *Abrahams* v. *Deakin* [1891] 1 Q. B. 516; the supposed wrongdoer was here a casual customer and not an employee. The charge was

[1] *Smith* v. *N. Met. Tram. Co.* (1891) 55 J. P. 630.

one of attempting to pass off a ten-mark piece as half a sovereign. Wills directed the jury 'that the manager of a business had authority to do all things reasonably necessary for the protection of his master's interest and property, and that no people were so exposed to having bad money passed on them as publicans'. He did not think it material whether the object of the arrest was to recover property or to frighten other people from attempting to steal it. This was of course at nisi prius, and Esher, Lopes, and Kay entered judgment for the defendant. It is interesting to note that the question of the liability of employers for such arrests made not to protect property, but to penalize crime, was still regarded as arguable: in the next year, it was again raised under very different circumstances. The servants of a carrier gave the scout of a rival carrier into custody on a charge [1] of loitering with intent to commit felony. His action against their employer was dismissed. The arrest was not necessary in order to protect the master's property, and it seems to have been regarded as immaterial that it was useful to protect his business secrets.

Practically, by this time, the old distinction between negligence and wilful torts was obliterated. Either, if committed in the course of the employment, entailed liability on the master. We shall see in the next chapter that this apparently simple proposition is not so simple as it appears. Liability for the wilful act rests on implied authority to be a law-breaker. Liability for the negligent act rests on no implied authority to be careless. But the broad fact remains that it was now considered that, so long as the acts are committed in the course of the employer's business, it does not matter that they are of a wilfully illegal [2] or even criminal nature. Where a

[1] *Stevens* v. *Hinshelwood*, 55 J. P. 341 (Esher, Bowen, and Fry).

[2] *Hamlyn* v. *Houston* [1902] 1 K. B. 81.

furniture dealer's manager, in the course of re-taking some hired furniture, committed an assault on the hirer's wife, the dealer was held liable:[1] it may be presumed that it would have been otherwise had the manager got into altercation with the hirer's family, and committed the assault in personal anger or irritation. Here, the assault was apparently merely a trivial one committed in the course of moving the furniture. 'It may well be that the question whether the offence is a criminal one may be a material fact for the jury to consider', so as to say that 'it could not have been done in furtherance of the master's business, or at all in the interests of the master'.[2]

Much the same set of circumstances had already arisen in *Richards* v. *W. Middlesex Water Co.* (1885) 15 Q. B. D. 660. Brokers committed an assault when executing a warrant of distress for non-payment of rates. Huddleston non-suited the plaintiff in an action against the company, and he was upheld by the Court of Appeal.

'It is undoubtedly true', said Coleridge C. J., 'that a master is in general responsible for the acts of his servants, providing their acts are done within the fair scope of the duty of the servants, and I have no desire to question the propriety of the decision in the case which has been relied on for that proposition, viz. *Bayley* v. *M. S. & L. Ry. Co.*[3] But here it was no part of the duty of the bailiff or his man, who were only authorized to levy the rate due to the company, to commit an assault upon the plaintiff.'

This betrays a curious misapprehension on the part of Lord Coleridge. He does not see that the bailiffs were not servants, and he does not appreciate the fact that, if they were, their employer would be liable for what they

[1] *Dyer* v. *Munday* [1895] 1 Q. B. 742.

[2] Per Esher M. R. This is a curious case: for the manager was fined in a police court, and thereupon freed by 24 & 25 Vict. c. 100, s. 45, from the civil liability which still adhered to his employer.

[3] (1872) L. R. 7 C. P. 415, 8 C. P. 148.

did in executing their duty, whether he had 'authorized' it or not. Smith J. limits himself, on this point, to a mere concurrence with Coleridge. It appears, however, that the assault was a wanton blow given to the plaintiff as he was proceeding to get the money demanded. Consequently, even were the bailiff to be held to be a 'servant', the act could scarcely be within the scope of his employment. It may be compared with the *corpus delicti* in *Lorimer-Riddell* v. *Glasgow* [1911] A. C. 209 (p. 167, *infra*).

In 1913 (*Radley* v. *London C. C.*, 17 July, Sc. L. T. 22 Nov., p. 148 : Avory and Lush), a tram conductor ran after and struck a boy whom he saw jumping on and off the car. This was held not to be within the scope of his employment, though it was a practical means of protecting his employers' interests. Otherwise it would have been a clear case of deliberate trespass in the course of employment.

From the cases cited, it will be seen that it is now very difficult to contend for the proposition laid down by Parke in *Sharrod*. Nevertheless, the proposition has never been overruled or directly questioned. The cases of liability for trespass are all cases of negligent or careless trespass, or else cases in which the defendant has been a company. In the latter case, it must necessarily act by agents and is therefore peculiarly liable to answer for them.

At present, the seductive theory of 'authority' is rampant : [1] and masters are being declared liable for their servants' uncontemplated torts, on the ground that they have authorized them, when no such authority has ever been dreamt of, and even when it has been expressly withheld. Of course, such a doctrine can be made to work, by a lavish use of the doctrine of estoppel. But can any more ludicrously inept result be conceived ? To create a fiction for the purpose of meeting it by another

[1] Cf. *Lloyd* v. *Smith, Grace & Co.*, *infra*, pp. 124, 126.

fiction is to juggle with lay figures instead of clearly facing realities. And a real danger exists: namely, that the liabilities of masters will be extended to agents. However little subject to control an agent is, and however casual his employment, he has as much 'authority' as a servant to do all things incidental to his employment: and his acts should, on this doctrine, equally involve his principal.

Will the 'estoppel' be graciously withdrawn in this case, and the principal admitted to prove the want of authority to commit tort and negligence? Why should it? Yet, if it is not, the casual giver of a commission will be liable for all that his agent does in discharge of it. Since the casual hirer of a conveyance was absolved, in *Laugher* v. *Pointer*, no such possibility has been recognized.

It is not the 'authority', but the functions, of a servant which are the true ground of liability.[1]

It is precisely when he departs from his 'authority' while remaining in his functions, that a servant becomes most dangerous. A groom has been warned not to take out a certain horse: he exceeds his authority in doing so, but he is exercising his functions, and if in his unauthorized career he meets with disaster, his master will be responsible to the victims, unless the groom's conduct was totally unconnected with his service.

In *Ellis* v. *Nat. Free Labour Assoc.* (1905) 7 F. 629, the Lord President (Dunedin) was asked by pursuers to frame the issue[2] against the master in the formula 'with the authority of the defenders, express or implied', while the defenders asked for it to be framed 'on the instruction of the defenders'. His Lordship very properly declined to allow either form.

'I do not think that either of the form of words is the appropriate issue for bringing this question before a jury.

[1] Cf. *Higgins* v. *Watervliet* (1871) 7 Am. Rep. 296.

[2] In a case of alleged defamation.

. . . The question in such a case is always: Was the servant in doing what is complained of acting within the scope of his employment or not? '

Lords Adam, M'Laren, and Kinnear agreed.

'How', asks Kay L. J. in *Stedman* v. *Baker & Co.* [1896] 12 T. L. R. 451, 'could the manager have implied authority to do that which would have been a wrongful act on the part of the proprietors? '

(iii) Motive of Servant

It need only be added that the novel doctrine of 'implied authority' eventually brought the Court up against the case where a servant does for his own wrongful purposes an act of a kind which he clearly has authority from the master to do. Why is the authority not to involve the master in liability in such a case? Once it has been established to exist, by estoppel or otherwise, why is it not to be applied, without regard to the motives of the servant? In *British Mutual Bank* v. *Charnwood* (1887) 18 Q. B. D. 718, Lord Justice Bowen beats the air in an attempt to save at once the principle of 'authority' and the innocent defendants. They had, he says, authorized their servant to do a certain class of acts, but they had given him no real or apparent authority to do them for his own ends! Yet it is certain that the intention of an agent to use his authority for his own ends, makes no difference to the liability of the principal.[1] The truth is that the fiction of 'authority' ought never to have been introduced into the discussion.

All these subtleties are simply illustrations of the complicated difficulties that arise when a liability is recognized which has no real foundation in justice or morals.

The looseness of the conception of 'scope of employment'—the desperate fictions, and the confusion with

[1] *Hambro* v. *Burnand* [1904] 2 K. B. 10.

agency and its doctrines rendered inevitable by the attempt to substitute the conception of 'authority' to be careless and tortious—flow directly from the vicious nature of the whole institution. Vicarious liability, being based on injustice, is incapable of being placed on a satisfactory foundation of logic.

(iv) Exceptions

These cases of liability for a servant's trespass require to be distinguished from those in which the real ground of liability is the personal fault of the master. Thus the employer's own negligence in employing a drunken porter was the ground of his liability in *Wanstall* v. *Pooley* (1841) 6 Cl. & F. 910. There are two classes of such cases which require special treatment.

a. Those in which the master is on the spot and in control at the time of the injury. In this case it is held that trespass lies, at any rate if the act is of the nature of trespass in the servant, the actual wrongdoer. The grounds of this rule are difficult to appreciate. It is not the business of an owner to consider himself in control of a skilled servant, and the rule seems to have been accepted rather carelessly. If the master is a sporting character there might be much reason for holding him liable. But if, in the leading case, he had been an elderly invalid, one hesitates to say that the rule would have been so broadly laid down. The ground of the liability is that the injury is in such cases the master's own act, and this can only be true in special circumstances. At sea, for instance, it would actually be unlawful for the owner or charterer to interfere with the navigation of the vessel by the shipmaster.

However, the decision in *Laugher* v. *Pointer* that casual hirers are not the masters of those who are supplied to drive the hired vehicle, led to the successful attempt to

make the hirer a co-trespasser. Being on the box (though not driving), and invested (according to his own facile admissions) with a power of control, he did nothing to prevent a collision caused by the postilions.

This raises a rather disturbing possibility of persons being held liable where no relation of service exists, but where in fact they are in a position to exercise control. It is fortunately qualified by the limitation that they must actually be present and exercising the control. In such a case, failure to exercise it may avail to make the party a joint tortfeasor. It is a doctrine which does not seem yet to have been extended beyond the particular case of driving vehicles, and it may be hoped it never will. The particular case—*McLaughlin* v. *Pryor* [1]—can well be placed on the ground of the admissions made by the defendant. They amounted to a declaration that he was actually controlling the course of the vehicle.

Several people hired a gig for an excursion. The defendant was not driving, but after a collision caused by the negligence of the postilions, he gave his card to the plaintiff and said that he would be answerable, observing subsequently that 'If you had gone quietly out of the inn, it would not have happened: I had intended to have pulled up and let you in again, in the front'. The case is remarkable for an express dictum by Tindal C. J., that, 'The general rule is, that all persons acting together at the time of the commission of a wrongful act, are presumed to assent thereto, and are in law considered as equally trespassers, and are all looked upon as principals.' If he had remonstrated, or had been inside the carriage, he might not have been liable. But, being on the box, and in a position to exercise control (apart from all question of ratification and admission), he was evidently present and assenting, and therefore a co-trespasser.

[1] (1842) 4 M. & G. 48.

Erskine, more accurately, says: 'It must be shown that he was assenting to the act from which the injury occurred.' The admission of the defendant that he had a control (though not the control of a master) over the postilions, strengthened the case against him. But apparently his presence and assent would have been enough. Cresswell lays stress on the element of control. 'He might, if he had thought fit, have stopped the whole proceeding.' This is to assume what is not proved: what would his co-hirers have done in that event? Was he more liable because he was on the box seat? Although not proved, however, his power of control was admitted by him: he sanctioned the act at the time that it was committed.

The same principle had been applied in 1832 in *Chandler* v. *Broughton*. The case is very shortly reported. The defendant had been sitting in a gig with his servant who drove: the horse ran away and did damage to the church in Langham Place. Verdict in trespass against the master. It was urged that case was the proper form of action, but *per curiam* trespass lay. For the act of the servant was the act of the master: 'he has the *immediate* control'. 'The master was present when the servant in the course of his service did an act immediately injurious to another.' Then trespass lies (*per* Bayley B.).

It is notable that in *Quarman* v. *Burnett*, Parke B. does not advert to this ground of liability. 'The hirer . . . may become liable by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, or to absent himself at a particular moment, and the like', but not, so far as appears, by sitting by the driver.

The well-known case of *Holmes* v. *Mather*[1] cast some doubt upon this doctrine, so far as *trespass* is concerned.

[1] (1875) L. R. 10 Ex. 261.

The defendant was seated beside his servant, who was driving, *and who asked him not to interfere.* A passenger being accidentally knocked down in the attempt to guide ungovernable horses, it was held that this was neither trespass nor negligence in the servant. Though he did to some extent guide the horses, it was not by his direct guidance of them that they struck the plaintiff. What interests us is that the Court doubted whether, if it *had* been his direct guidance that caused the injury, the employer would have been liable. Russell, *arguendo*, suggested that there was no implied authority to commit trespasses.

Faulds v. *Townsend* (1861) 23 D. 437, is a peculiar case which can hardly be right. It shows the extent to which the personal negligence of the master may go. The servant of a manufacturing chemist bought a stolen horse, killed it, and used its carcass in the business. The chemist, on the ground of his own personal negligence, was held liable.

β. Those in which the damage is the natural and probable result of an act ordered by the master.

In *Gregory* v. *Piper* (1829) 9 B. & C. 59, we get again the question of whether the master can possibly be liable for the wilful (as distinct from the negligent) act of the servant. Told to pile up rubbish so as not to touch a neighbour's wall, a servant piled it up in such a way that the natural consequence was that it rolled down and did touch it. The owner sued the master in trespass. It was urged that as the servant did nothing negligent, but knew that the natural result of what he was doing would be to bring the rubbish down the slope against the neighbour's wall, the master could not be liable. He was held liable: but, it is important to observe, not on the ground that he was liable for his servant's working trespasses, but that having given the specific order, the natural and probable result of which was the *clausum fregit*, he was himself the prime mover in the transaction.

Littledale J. gets very confused, coming to the conclusion that 'if the servant, in carrying into execution the orders of his master uses ordinary care, and an injury is done to another, the master is liable in trespass: if the injury arise from the want of ordinary care in the servant, the master will only be liable in case': so that it is safer to employ a careless servant than a careful one. This was at that date only true when the injury was the natural and probable result of a specific order. For an uncontemplated trespass on the part of the servant, no master had yet been held responsible. Littledale's dictum that when a master imposes a restriction 'which it is difficult for the servant to comply with', the master is liable in trespass if caused by disregarding it, has not met with subsequent acceptance, or indeed, attention. It only means that it is not natural to suppose that a servant will take extraordinary precautions to prevent trespass. Parke J. puts the *ratio decidendi* much more clearly. 'Stubbings (the servant) says he was desired not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was therefore probable that some of it might run against the wall. Stubbings said that some of it "of course" would go against the wall. The defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done, and one of these probable consequences was that it would touch the plaintiff's wall.'[1] *Gregory* v. *Piper* is thus merely a case of the master's own responsibility for his own acts. He ordered the very thing to be done which was the direct cause of injury.

Logically, it may be presumed that this class of cases in which the master is liable for the probable results of his own conduct or directions, covers the whole series of

[1] This, however, is not very consistent with older cases, such as *Reynolds* v. *Clarke* (1724, 1 Str. 634). But the distinction between the forms of action was rapidly fading.

cases in which employers have since 1870 been held liable on the fiction of 'implied authority'. It may be argued that it is so certain that subordinates will trespass, that their very appointment is tantamount to a series of trespasses on the part of the master. But it must be pointed out that in *Gregory* v. *Piper* the whole circumstances of the specific case were intimately known to the master. He could, at the time he gave his order, have known exactly to whom, and in what way, it would cause injury, and, approximately, the amount of the damage. This renders the case consistent with the non-liability of the master for the merely probable trespasses of a coachman —which the current theory of 'implied authority' is not.

The defendant in *Gregory* v. *Piper* did not give 'implied authority', but 'implied orders' to commit the trespass.

(v) Defamation

The modern invention of negligent defamation [1] theoretically introduces the doctrine that masters have been liable for their servants' defamatory negligence all along. But this kind of libel is really an innovation, and still rare —long may it so remain. For the standard class of libel and slander—statements intentionally made which prove to be defamatory — masters have seldom [2] been sought to be made liable in England. In Scotland, such attempts have been more frequent (*vide* pp. 166–8, *infra*).

It seems that in cases of slander, the Courts in America have sometimes evinced a habit [3] of imputing such spoken words to the servant's personal irritation, so constant as to introduce almost an exception to the general rule of liability. But a coachman is equally liable to such motives in cases of trespass.

[1] Cf. *Law Magazine*, Nov. 1896, p. 21. 'Is *Tompson* v. *Dashwood* over-ruled?' (11 Q. B. D. 43).

[2] Cf. pp. 68, 71, *supra*.

[3] See *Behre* v. *N. C. Ry. Co.* (1897) 100 Georgia 213, 62 Am. St. Rep. 320; and cf. 23 Harv. L. R. (1910) 305, and the Scottish cases, *infra*, pp. 166–8.

CHAPTER VI

FRAUD: LIABILITY TO BAILORS

THE action against employers which had originally been given for careless damage done to person and property (technically *case* and negligent trespass) had, as we have seen, by about 1850 been extended to cases of wilful and direct damage (*trespass*) and to cases of conversion of property to the wrongdoer's use (*trover*). The way was now clear to extend it to fraud and defamation, which has been the work of the second half of the nineteenth century.

Fraud, of course, had been the gist of many actions against employers dating back to the seventeenth century. But, as we have seen, the essence of liability in these actions was contractual. The defendant had held out the fraudulent servant as a reliable person to contract with. The modern development was to make the employer liable for fraud apart from contract.

It is not the case that every fraud committed within the scope of a person's employment is necessarily committed within the scope of his contractual agency. In order to charge the master on the contract the servant must have been held out as having authority to contract. But to support a case of fraud against the master, all that is now necessary to show is that the fraud was incident to the employment, whether the party defrauded may be supposed to have relied on the master's liability or not. This differentiates the recent cases sharply from the ancient ones.

It is quite possible that in the over-zealous, the stupid,

or the superfluously skilful discharge of his duties, a servant may make contracts which he has no real or apparent authority to make. And if these contracts are technically fraudulent, i.e. induced by a wilfully false representation of fact, it may be that the analogy of case and trespass will make the employer liable in these cases. The same would be true if the fraud resulted, not in the making of contracts, but in the obtaining of property or possession.

Story's editor (*Agency*, § 452) says, sensibly, that it is difficult to see upon what principle a person can be liable in an action of tort for a deceit or a fraud of which in point of fact he was not cognizant. But, if he is not answerable for these torts, there is no reason why he should be answerable for any others.[1] The doubt thus expressed by Greenough was shared by the Court of Exchequer as lately as 1861 (*Udell* v. *Atherton*, 7 H. & N. 172: Pollock and Wilde *contra* Bramwell and Martin). It was not until *Barwick* v. *English Jt. Stock Bk.* (1867) L. R. 2 Ex. 259, that the applicability of the doctrine to cases of fraud was finally decided. And in Scotland it does not seem to be yet admitted.[2] Even in England it seems still dubious whether it must not be committed 'for the [actual] benefit' of the employer as well as 'in the scope of the employment'.[3]

In *Raphael* v. *Goodman* (1838) 8 A. & E. 565 it was decided that a plea of a sheriff's fraud was sustained by proof of fraud on the part of his officer. A sheriff is, however, in a very special public position. But in 1855[4]

[1] Cf. *per Cur.* in *Barwick's* case, p. 265.

[2] *Addie* v. *Western Bk. of Scotland*, L. R. 1 H. L., S. & D. 145.

[3] *M'Gowan* v. *Dyer* (1873) L. R. 8 Q. B. 141; *British Mutual Bkg. Co.* v. *Charnwood Forest Railway Co.* (1887) 18 Q. B. D. 714; and cf. *Lloyd* v. *Grace, Smith & Co.*, *infra*.

[4] *Coleman* v. *Riches*, 16 C. B. 104. A wharfinger's servant issued a false receipt for goods, whereby the plaintiff was induced to pay for

it was distinctly laid down that a servant's fraud might render the master liable: though in the particular case it was held to have been committed outside the scope of the servant's employment.

But in *Dodgson's* case[1] and *Bernard's* case[2] two most experienced Vice-Chancellors, Knight-Bruce and Parker, held that directors could have no authority from a company to commit a fraud. In *Mixer's* case[3] Lord Campbell, Lords Justices Knight-Bruce and Turner, held the same. 'Clearly there was fraud, and gross fraud, on the part of the directors, and I have no doubt that the shareholder was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors which cannot be attributed to the company.' Of course, if the statements are adopted at a shareholders' meeting a different complexion is put upon the case.[4]

A very notable case is *Western Bk. of Scotland* v. *Addie* (1867) 1 Sc. Ap. 145. Although it turned entirely upon contract (to take shares), it was the occasion of important and much-criticized remarks by Lords Chelmsford and Cranworth. Both expressed the opinion that a company could not retain benefits which they had gained through the fraud of their agents. But both declared that this was the limit of their liability. 'If the person who has been induced to purchase shares through the fraud of the directors instead of seeking to set aside the contract prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally' (*per* Chelms-

them on a purported sale by the alleged owner. The case resembles those in which a company official, for his own ends, takes upon himself to issue certificates.

[1] (1849) 3 De G. & Sm. 85. [2] (1852) 5 ibid. 289.

[3] (1859) 4 De G. & J. 575.

[4] Cf. *per* Westbury C. in *N. Brunswick and Canada Ry. Co.* v. *Conybeare* (1862) 9 H. L. C. 725.

ford C.). 'An incorporated company cannot in its corporate character, be called upon to answer in an action of deceit' (*per* Cranworth). These distinct utterances have been repudiated by subsequent judges, and *Addie's* case distinguished on the ground that the company had not actually been incorporated when the false representations were made. That was certainly not the ground of the decision, though Cranworth (p. 167) adverted to the fact. In the same year was decided a case in the Exchequer Division which has had far more influence and currency in quotation.

Barwick v. *English Jt. Stock Bk.* (1867) L. R. 2 Ex. 259,[1] held a banking company liable for the fraud of their manager. 'No sensible distinction can be drawn between fraud and . . . any other wrong.' The general rule of vicarious liability is not taken for granted, but even at that late date (1867), it is enunciated as a generalization of the cases of (1) running-down, (2) false imprisonment, (3) infringement of ferry. The manager had, in the interests of the bank, made false representations. The case was a pure generalization by Willes from the broad doctrine which had been laid down by himself in *Limpus's* case. As we have seen (p. 91, *supra*), that doctrine rests on the very slender foundation of an observation in *Huzzey* v. *Field*, the interpretation put on which is contradicted by considered judgments of its author, Lord Wensleydale.[2]

It was thus laid down that the fraud of the crafty agent could involve in liability the candid and straightforward principal. This decision was a serious step in advance, for this reason: that the liabilities which may be incurred by fraud are of a more portentous nature than are practically likely to result from negligence or trespass.

[1] J. Brown, Q. C., argued for the plaintiff. Cf. *infra*, p. 150.

[2] *Supra*, pp. 90, 91.

Their recognition brings the principle of liability from the sphere of physical damage into the sphere of account.[1]

That some hesitation was felt by good judges is apparent from *Swift* v. *Winterbotham* (1873) L. R. 8 Q. B. 244, which purported to follow *Barwick*. A bank manager made false representations as to a customer's credit, thus inducing a party to supply the latter with goods and to incur eventual loss. In an action of deceit, the bank were held liable. But Coleridge pointed out on appeal (*Swift* v. *Jewsbury* (1874) L. R. 9 Q. B. 309) that the bank were not going to profit in any way from answering the query: it was no part of their business to answer it; and if their manager liked to go out of his way to afford the information, it affected only himself. It was, in fact, like a coachman taking a friend for a drive. The jury had found that it was within the scope of his duties to give such information on behalf of the bank; but in this case Lord Coleridge held he had given it on his own behalf, and not in the execution of his functions as manager. The application (says Bramwell) was made to him 'individually'. It must be confessed that this reasoning is not satisfactory. The letter of inquiry was addressed to him specifically as 'The Manager, Gloucester Banking Company'. See also *Robinson* v. *National Bank of Scotland* (1915) 2 Sc. L. T. 334.

[1] In *Mackay* v. *Commerc. Bank of N. Brunswick* (1874) L. R. 5 P. C. 394, the Privy Council adopted Willes's principle that a 'master' (not 'principal') is liable for every such wrong of his servant 'or agent' as is committed in the course of the 'service' and for the 'master's' benefit. This confused holding was not necessary to the decision, which was simply that where a servant (a bank cashier) induced a person to make a contract by a false and fraudulent representation in the bank's supposed interest, and the bank thereby got that person's money, it could be forced to repay it. In other words, the whole question was one of contract, and of the liability to repay money paid under a voidable contract (the frame of the action thus being in tort). Cf. *Foster* v. *Essex Bank* (1821) 17 Mass. 508.

In the same case Coleridge C. J. remarks that: 'Where a corporation take advantage of the fraud of their agent, they cannot afterwards repudiate the agency and say that the act which has been done by its agent is not an act for which they are liable.' This puts a reasonable limit on the doctrine, but the fact of advantage to the corporation as an element in establishing liability is energetically repudiated by Lords Macnaghten and Halsbury in *Lloyd* v. *Grace, Smith & Co.* (*infra*, pp. 124, 126).

Fraud had thus become by 1870 established as a ground of employers' liability. Of course, like other grounds of liability, it must occur in the course of the servant's employment. And it is not necessarily 'in the course of employment', if it is perpetrated in connexion with the employment. If it is exercised for the servant's own ends, it will not affect the employer. This was made clear,[1] if *Swift* v. *Jewsbury* required corroboration, in *British Mutual Bkg. Co.* v. *Charnwood Forest Railway Co.* (1887) 18 Q. B. D. 714, where the head-note, gratuitously including (on the invitation of Bowen) 'agents' along with servants, does not correctly express the decision. The servant was the secretary of the defendant company, and gave untrue answers to questions put by the plaintiffs as to the validity of certain purported transfers of stock in the company. He did this for his own purposes, in order to cover the fact that the supposed stock was bogus, having been 'issued' by himself beyond the amount competent to the company. The company was exonerated. The alleged liability was put upon the ground that the delinquent secretary was 'held out' by the company as a person from whom accurate information

[1] The cases in contract where it has been held that a principal can be made liable where an agent has used his authority for his private ends, serve to show the great difference between the liability *qua* master and that *qua* principal. *Hambro* v. *Burnand* [1904] 2 K. B. 10.

could be obtained as to the affairs of the company. If so, his failure to give accurate information was not so much fraud, as breach of an implied contract (for which, however, it is difficult to see any consideration)—or, possibly, breach of a statutory obligation. It is possible that, on the principle that a person 'intends the natural and necessary consequences of his acts', the requisites of the tort of deceit were supposed to be satisfied.[1]

Ruben v. *Gt. Fingall Consolidated* [1906] A. C. 439 is a similar case. The secretary of a company issued a forged certificate to a bank as supposed transferees of the company's shares, on the strength of which the bank advanced his stockbrokers money which they paid over to him. The secretary defalcated, and the bank sued the stockbrokers, who repaid the advance. The bank then sued the company for damages for refusing to register the stockbrokers as owners of the shares. This case raises no question of contract between the company and any other party. The servant was not held out to the world as a person empowered to enter into contracts on its behalf (as in *Lloyd* v. *Grace, Smith & Co.*). He was merely a ministerial officer performing a statutory duty, and the question was simply whether he was acting in the company's service when he amused himself by forging transfers and certificates. Naturally, it was answered in the negative. *Whitechurch* v. *Cavanagh* [1902] A. C. 117 is a case of the same kind.

[1] In a similar case of *Barnett, Hoares & Co.* v. *S. London Tram. Co.* (1887) 18 Q. B. D. 815, the secretary of the defendants made an erroneous but innocent representation to the plaintiffs as to the amount of certain percentages which the defendants owed (though not so as to be immediately payable) to customers of the plaintiffs. This was equally held not to be within the scope of the secretary's employemnt: but here there was no question of deceit, but of estoppel and assignment merely. It would be most unreasonable, the Court of Appeal held, to bind the company by whatever their secretary chose to say.

The attempt has indeed been made to argue that, because a servant or agent employed to make contracts effectively binds his master or principal whether he makes them for his own private ends or not—therefore a servant who commits fraud binds his master whether his motive was purely his own gain or not. The attempt of course failed: and although it seems to have had some weight with the Bench in *Lloyd* v. *Grace, Smith & Co.* [1911] 2 K. B. 489; [1912] A. C. 730, that case was, as will be seen, purely one of contract.

Lord Robertson, in *Whitechurch* v. *Cavanagh* (1902) A. C. 117, indeed said:

'I find it extremely difficult to hold that the scope of an agent's employment can be limited to the right performance of his duties, or to say that an agent within whose province it is truly to record a fact is outside the scope of his duties when he falsely records it—when the question of liability to be decided is whether a loss is to be borne by the principal who placed him there, or by an innocent third party who had no voice in selecting him.'

But it is not to limit the scope of an agent's employment to the right performance of his duties, to say that if he travels altogether outside his duties, his master will not be liable. If, on receipt of a transfer, the secretary carelessly issued a certificate to the wrong person, this could not be termed 'the right performance of his duties', and yet his employers might well be liable, as Lord Brampton points out (p. 139), and as they were in fact liable in the *Balkis Consolidated Co. Ld.* v. *Tomkinson* [1893] A. C. 396.[1]

In *Houldsworth* v. *City of Glasgow Bank* (1880) 5 A. C. 317 (which was a Scots case) relief was refused to a person injured by the officials of a banking company in peculiar circumstances. He had been induced by false

[1] 'I cannot acquit the appellants [defendants] of a certain amount of negligence or want of due care,'—per Field J.

representations of the directors and the manager to become a stockholder in the concern. It was held, in conformity with the general principles of winding-up, that he could not claim in competition with outside creditors of the bank, whether his alleged claim was valid or not. In any event, the claim was essentially contractual, or based on the confidence which the bank invited persons to repose in their officers. A manager is appointed to make contracts: if he makes them fraudulently, the other party has a claim on the footing of *Hern* v. *Nichols*.

Wilson v. *Fuller* (1842) 3 Q. B. 68 is another action of fraud entirely turning upon contract.

Irving v. *Motley* (1831) 7 Bi. 543 is also a case of contract.

Russo-Chinese Bank v. *Li Yan Sam* [1909] A. C. 174 was also a case of contract, and the limits of an agent's authority. It has no bearing on the vicarious liability of employers.

In the recent important case of *Lloyd* v. *Grace, Smith & Co.* [1911] 2 K. B. 489, the confusion between agent and servant again arose. This would not so much matter, only that it tends to confuse the questions of tort and contract. As a matter of fact, the subordinate was a servant—a managing clerk to a solicitor. By the servant's fraud, a client was induced to invest the servant with the control over her property, which he misapplied. It can hardly be doubted that here there was a clear case of a contract for services which the clerk had express authority to enter into. Yet we find the judges regarding the question as one of 'authority to defraud',—two of them absolving the solicitor from the consequences of his servant's deceit because he had given him no authority to act on his own behalf, and the third invoking a fiction to combat a fiction, and holding the master estopped from denying an authority which he had not given.

Farwell L. J. insists on the necessity of 'authority' and places the cases where there was clearly no authority, and yet the employer was bound, on the ground of estoppel. He thus disposes of *Hambro* v. *Burnand* (*supra*, p. 121), in which a principal was held liable for his agent's authorized contracts, when as a matter of fact the agent made them for his own private purposes. But estoppel was never once mentioned by the judges in that case. It was rested on the simple ground that it does not matter what your agent's mental motives are, if he is carrying out your objective instructions.

The solicitor's liability really existed, as we think, and lay in contract. He held out the clerk as his agent, and the non-performance of the client's instructions amounted to a breach of the contract which arose on their receipt. Farwell and Kennedy L. JJ. adopted the somewhat extraordinary answer that nobody—not even a lady client—could think (or, in Farwell's favourite phrase, 'be heard to say' that they thought), that a speculative and unreasonable transaction could possibly be within the competence of a managing clerk. 'Her unfounded and unreasonable belief cannot enlarge the agent's authority.' The case, in this aspect, is very like *Bishop* v. *Jersey* (*Countess*) (1854) 2 Drew. 143, where the bank was relieved. But it is still more like *Thompson* v. *Bell* (1854) 10 Exch. 10, in which a bank manager persuaded a lady to pay him money as on a purchase of a house from the bank. In that case the bank was held liable.

Very fortunately for the sake of principle, if not of employers, the case was reversed in the House of Lords. It was put by the Earl of Loreburn on the ground of contract—which we have already suggested was the true basis. The manager was held out to the world as having authority to put through business matters; he was consulted in that capacity, and his implied undertaking

bound his principals. They were not liable on the ground that their servant had been deceitful to a stranger with their authority: but because they had held out a person as having authority to contract on their behalf and to carry out the contract without deceit.

Jervis C.J. points out in *Coleman* v. *Riches* (*supra*, p. 117 *n.*) this distinction very clearly:

'If there had been any such contract [as that a customer should receive reliable vouchers from a wharfinger's servants, in consideration of dealing at his wharf], a very different question might have been raised—for in that case, it might possibly have been said that the wharfinger had undertaken to supply competent persons faithfully to perform that duty.'

In *Lloyd* v. *Grace, Smith & Co.* [1912] A. C. 730, Lords Halsbury and Macnaghten repudiate the contention that a principal is only liable for his agent's fraud if he has benefited by it. It is sufficient, they say, that it was within the scope of his agency. This may be right, so far as a servant-agent is concerned. But it would require much more argument to show that it applies to the ordinary case of principal and agent. Lord Salvesen, we think, appreciates this case rightly in *Aiken* (1913) S. C. 66:

'The view of the Lord Chancellor that a lawyer who employs a managing clerk to attend to the business of his clients contracts that he shall perform his duties faithfully and honestly, was a sufficient ground for inferring responsibility.'

And Lord Dundas expressed his concurrence in Lord Ardwall's remarks in *Agnew* (1906) 8 F. 422 (*infra*, p. 166).

Liability to Bailors

This point may be conveniently dealt with here, because, like liability in fraud, it is intimately bound up with questions of contract.

In *Cheshire* v. *Bailey* [1905] 1 K. B. 237,[1] Collins M.R. suggests that the true proposition is that in such contracts the master undertakes, not to provide careful servants, but to provide servants whose 'business it would be' to look after the property concerned; apparently inferring that a want of care in looking after them would then be a tort committed in the course of employment, so as to entail liability on the master. This seems a forced line of reasoning. There is a perennial difficulty, in cases of bailment, as to whether the liability of a bailee is contractual or tortious. But it ought not to arise here. The degree of care which a bailee or his servant uses in the execution of the contract is surely of the essence of the contract itself. It is only when the bailee or his servant injures the chattel in a way which any outsider might have done, that the question of tort and of possible vicarious responsibility arises.

It appears to me that (reverting to the facts of the particular case) a job-master does contract to supply a driver who (so long as he is honest and keeps to his work) will be careful of the contents of a traveller's samples, and that this simple proposition is not improved by dressing it up in the form that the contract is to supply a driver who, being employed to give an eye to the samples, will involve the job-master in an action of tort if he fails to do so. As in the case quoted below (p. 172) from the Digest, the master implicitly contracts that his servants shall be reasonably skilful and careful in dealing with the property entrusted to them. He does not warrant their integrity, as to which he is not an expert.

[1] Vide *infra*, p. 129.

CHAPTER VII

SCOPE OF EMPLOYMENT

'Scope of Employment' is a conception which has come to have two perfectly distinct and separate meanings.

It originally meant the proper and lawful acts which a servant was employed to do, or which were incident to his employment (such as attending to be paid). For his want of care or skill in the performance of such acts, his master would be, and will be, responsible.

It has also come to mean the unlawful and tortious acts which a servant (and perhaps an agent) is supposed to have been empowered to do: whether he can exactly be said to have been employed to do them or not.

It is exceedingly important to realize and to apply this distinction in the following pages. A servant may well be acting 'in the scope of his employment' so as to render his employer liable for any negligence on his part, although he may be acting without any authority. He may have been expressly told not to drive after dark, and it is only by a vigorous use of the totally inappropriate doctrine of estoppel that, in the face of this, he can be clothed with 'authority' to do so. But his employment as a coachman is not affected by his disregard of the instruction.

Further, he may be doing an act which he is authorized to do, or which is within the scope of his employment. But it does not follow that his master will be liable without more for the wilful wrongs committed for its better execution. As liability for them rests on authority to commit them, their own nature and authorizability must themselves be considered.

The difference between the two conceptions is well illustrated by two cases of recent date, if we disregard their contractual features.

In *Cheshire* v. *Bailey* [1905] 1 K. B. 237 (*supra*, p. 127), the contractual element might well have come into play. The injured plaintiff had hired the defendant job-master's horse and brougham. The coachman, provided by the defendant, (in effect) stole the samples of silver which the hirer was taking to show to retail silversmiths. Clearly, it was no part of the driver's duty to steal samples. On the contract to provide a competent driver, there might have been some ground for the action, as it was specifically mentioned that a ' trustworthy ' driver would be required. Otherwise, for this act of *trespass*, clearly outside all ' authority ', and not even saved by the widest invocation of estoppel, no action against the master lay. But in *Abraham* v. *Bullock* [1901] 86 L. T. 796, it was through the driver's *negligence* that the goods were stolen, and this involved the defendants in liability to their customers, for it was negligence in the performance of his duties.

The distinction is one between the ancient liability for a servant's negligence in doing his work, and the modern liability for his trespasses in doing his work. ' Scope of employment ' in the former case is an elastic conception. It connotes the kind of work which servants of that kind do. In the latter case it is a rigid conception. It depends on what they had orders to do.

When, in about 1860, a master became liable for the deliberate trespass of his servant, the test of motive was maintained. Were the wilful acts done with a view to the master's interests, or were they done simply to gratify the servant's own personal pique or ends ? If a coachman drives down a short cut across private property, his master may be liable (though not necessarily) if the coachman wants to get the horses in in good time, but he

will certainly not be liable if the coachman merely wants to get home in time for his own tea. Yet the coachman remains coachman : he is still fulfilling his duty of driving his master's horses home, and if he drives negligently in the short cut, the master will be liable for the results.

Such was the doctrine of *Limpus* (*supra*, pp. 90, 92) and *Barwick* (p. 119). The test of liability for 'implicitly authorized' trespass and fraud was expressly placed in the motive which actuated the servant, not in performing his duty to which it was incident, but in performing the very act of trespass itself. But a tendency has arisen to abandon the distinction, and to assimilate the liability of the master to the contractual liability of a principal, without regard to the servant's intention. For an independent act, entirely dissociated from the master's service, although perhaps facilitated by the chattels placed at the servant's disposal, the servant alone will be liable. But for an act of trespass (and, we have seen, of other wilful wrong) resembling the acts which the servant was employed to do, there is a tendency to hold the master liable, whatever the actual motive for doing them was. The formal expression of this tendency is to declare that the words 'and for the master's benefit' in Willes's judgment in *Barwick* are pleonastic,—and that any act 'of the kind' which a servant was employed to do must be supposed to have been done with an eye to the master's benefit. Thus, to put a crude example, a coachman is employed to drive : and he is further employed to choose the direction in which he will guide the horses. Therefore, if he chooses deliberately to drive over a pig, for the pleasure of hearing it squeak, the master is responsible for his trespass.

Or, to adopt the illustration given above, the coachman who, for his own personal profit, turns the horses, in driving home, down a stranger's avenue, involves his master in the act. This innovation on the doctrine of

Limpus and of *Barwick* appears to be based on a confusion with the contractual liability of a principal for his agent. It does not matter what the real motive of an agent in contracting was, if he acted within the scope of his apparent authority. This is because he is held out as an agent, and people are invited to rely on the principal's implementing his promise. But this argument has no application to cases of tort, except such as arise out of contract.

From the time of *Croft* v. *Allison* (*supra*, pp. 82, 85) it has been customary to add to the words 'in the course of the employment', the further phrase 'and for the master's benefit'. These words were used in *Limpus* and in *Barwick*: they have been treated as possessing a meaning in subsequent cases in the Lords and Court of Appeal (such as *Dyer* v. *Munday* [1895] 1 Q. B. 742). But the recent development rejects them as surplusage. For this, the confusion between the employment of servants and the instruction of agents is responsible. If an agent does the sort of thing he is told to do, he involves his principal—whatever his motive was: certainly in contract, and possibly in tort, though this is scarcely probable. But if a servant is doing what seems to be his work, and doing it negligently, the question always arises, Was it really his work? Was he in fact acting with an eye to his master's business in performing it, or was he only actuated by his own private motives? was he only gratifying his own private desires?

Probably it will be correct to say that the words still retain a real meaning in the case of negligence. The act which is negligently done must not only be an act of a kind that such servants are usually accustomed to do, but the servant must in fact be doing it for the master's purposes and not his own. But with regard to deliberate wrongs, it is otherwise. If the 'implied authority' to commit such illegalities can be spelt out, it is possible, and even probable,

that—on the mistaken analogy of contracts made by agents—it will not matter in whose supposed interest that authority is being used.

In *Ruben* v. *Gt. Fingall Consolidated* (*supra*, p. 122), counsel argue that the words 'for the master's benefit' used by Willes in *Barwick* mean merely that the act is one of a class which the servant has to do. They even include the possibility that he may be doing it for his own purposes. 'If a railway servant gave a man into custody because he disliked, not because he suspected, him, the company would still be liable in an action for false imprisonment.' This extreme doctrine can hardly be sustainable, and has indeed been repudiated in Scotland.

Nevertheless, Lord Justice Farwell, extending the beneficent influence of the 'implied authority' theory to the case (of negligence) in which it was never needed, has gone so far as to discard the established necessity that a servant should be acting with a mind directed to the fulfilment of his duties in a case of neglect. If the act which she negligently performed was the sort of act she was engaged to do, the motive of it appears in his judgment to be prima facie immaterial, though he somewhat curiously allows the master to prove that she was acting solely on her own account. 'An act done within the scope of the employment is by legal intendment for the benefit of the master, unless and until the master proves the contrary.'[1] This (unless perhaps in Equity?) is the first hearing of it. No such displaceable onus is known to the Reports. If Farwell's suggestion is right, not only may a master be liable for what he may be supposed to have 'implicitly authorized' the servant to do (however illegal), but also for all the servant's negligences, not in performing his orders, but in doing on his own account what he might properly have been doing for his master.

[1] *Smith* v. *Martin* [1911] 2 K. B. 783; p. 143, *infra*.

But, putting aside this rather fantastic suggestion, there is a real sense in which it is true to say that the act need not be done for the master's benefit, so long as it is within the scope of the employment. For there are numerous acts incident to the status of servanthood which cannot be said to confer any direct benefit on the employer. To that extent, and to that extent only, it is true to say that the question of the servant's intention to act in the master's interest is in cases of negligence immaterial. If the wrong is committed with the motive of the furtherance of his functions, it appears to be enough. It is to go a great deal further to assert that the master will be liable for any act which the servant might have done with that motive, but which in fact he did for objects of his own. A servant is entitled to certain services on the part of fellow servants, as incidental to his employment. If in securing and enjoying them he inflicts negligent injury on a stranger, he may well be doing so in the scope of his employment. The acts of the Unjust Steward, in reducing his master's claims, were certainly in the course of his employment, and as certainly against his employer's interest. The acts of the servant in *Smith* v. *Martin* (*infra*) were acts of supervision and management as a teacher—acts done partly with an eye to her own comfort and benefit, but acts which in her capacity of teacher she was (as the Court thought) employed to do. That the employers derived no personal advantage from them did not prevent the acts from being done 'for their benefit': they were not done solely for the private ends of the teacher, but as part of the management of the school.[1]

Let us pass from the ancient liability for negligence,

[1] At the same time, it seems difficult so to hold, on the particular facts of this case. More properly, the liability should have been based on contract. In consideration of the attendance of the child, the authority should have provided a careful teacher.

and consider the bearing of the words 'for the master's benefit' on the modern liability for 'implicitly authorized' deliberate wrongs. Perhaps the extreme limit in this direction is reached when Sir C. Farwell[1] (confusing, we may remark, agency with servanthood) declares that to involve the 'principal' it must be shown that the 'agent's' act was within the scope of his 'agency', and that if this is done, the act is *presumed* to be for the principal's benefit.

But this extreme doctrine, which denies all force to the phrase 'for the master's benefit' in the new class of cases which rest on an implicative authority, is still open to criticism and rejection. Although approved by some of the Lords in the same case, it is open to the observation that it was too evidently founded on a confusion between the liability of a principal in contract and the liability of a principal in tort to be taken as a safe guide. In *Lloyd* v. *Grace, Smith & Co.* [1911] 2 K. B. at p. 507, Farwell L. J. again mixes up the questions of servanthood and agency, commencing a sentence by saying that the qualification of the principal's liability is confined to cases where the agent acts for, or with a view to, his own benefit, and concluding it by observing that the words 'for the master's benefit' 'extend to cases where *the servant* acts with a view to such benefit'.

Actual benefit ensuing to the master is of course never necessary; except (and this is hardly likely) in the case of fraud (where the gist of the action has been[2] said to be the enrichment of the defendant).

Lord Esher puts the matter succinctly in *Brit. Mutual Bank* v. *Charnwood Ry. Co.* (1887) 18 Q. B. D. 717:

'The rule has often been expressed in the terms, that to bind the principal the agent must be acting "for the

[1] *Lloyd* v. *Grace, Smith & Co.* [1911] 2 K. B. at p. 508.

[2] This view may perhaps be taken to be exploded.

benefit" of the principal. This, in my opinion, is equivalent to saying that he must be acting "for" the principal, since, if there is authority to do the act it does not matter if the principal is benefited by it.'[1]

It would be beyond the limited aim of this work to discuss at any length what is or is not 'within the scope' of a servant's employment. The cases have varied very much. At nisi prius in 1840[2] Gurney held that a coachman who found his way blocked by a van and got down from his box and interfered with the van-horse did not implicate his mistress by the negligent way in which he did it. He was off his box. No doubt there was some evidence of irritation on his part, but the case shows the narrow limits which were then attached to the term 'service'.

The matter is one, it seems, for the determination of the judge, as a question of law, and is not usually left to the jury.[3] This, in itself, is a somewhat remarkable fact. Apparently the rule extends to both senses of the term 'scope': to lawful service and unlawful trespasses.

It will be sufficient here to quote the well-known cases in which it has been established that when a servant in control of his employer's property and on his employer's business, makes a deviation for his own purposes, he is not, while it lasts, acting within the scope of his employment.

Mitchell v. *Crassweller* (1853) 13 C. B. 237 is the leading

[1] Lord Esher, it will be observed, speaks of 'principal' and 'agent', instead of 'employer' and 'servant', and of 'authority', when the real gist of the action is not a supposed authority to do wrong but the mere relationship of master and servant. But this was *per incuriam*; his lordship lays down the true rule accurately in *Smith* v. *N. Met. Tram. Co.* (p. 104 *n.*, *supra*).

[2] *Lamb* v. *Palk*, 9 C. & P. 629.

[3] *Aliter* in *Joel* v. *Morrison* (Parke); *Whatman* v. *Pearson* (Byles). 'I agree', says Byles, 'that it is doubtful whether these questions ought not to have been decided by the judge, but for safety's sake I left them to the jury' (L. R. 3 C. P., p. 425).

case on the subject. A carman, after finishing the day's business, drove a fellow workman (who was unwell) to Euston Square, and in driving home injured the plaintiffs. The first allegation, it is interesting to note, relied on the possession of the cart and horse by the defendants. This, though not without support from dicta,[1] was ruled immaterial. The main allegation was that the defendants, 'by their servant', knocked the plaintiffs down.

Parke had (in *Joel* v. *Morrison* (1824) 6 C. & P. 501) drawn a somewhat fine distinction between injuries done in the course of a deviation adopted for the servant's own purposes, and injuries done in the course of an independent drive. In the first case, he suggested, the servant is still on the master's business, though he is executing it in an improper way. In the second, the master's business has nothing to do with the case. The point then immediately arises, what if the détour happens at the very end of the journey, and before the horses are stabled? Such a case arose in *Sleath* v. *Wilson*,[2] where Erskine held the action maintainable against the master. 'Till the servant had deposited the carriage in [the stables] the defendant was liable for any injury which might be committed through his negligence.' Practically the same state of facts existed in *Mitchell* v. *Crassweller*. The defendants were absolved. A 'small' deviation, said Jervis, might not affect the liability of the master. But in *Sleath* v. *Wilson*, the driver was four miles out of his way,—which cannot be regarded as a small détour on any hypothesis. Maule remarked that 'The master is liable even though the servant, in the performance of his duty, is guilty of a deviation. But where the servant, *instead* of doing that which he is employed to do, does something which he is not employed to do at all, the master' is not responsible. This is scarcely recon-

[1] Cf. p. 82, *supra*.

[2] (1839) 9 C. & P. 607, and 2 Mco. & Rob. 181.

cilable with *Sleath* v. *Wilson*, though Maule thought it reconciled 'all the cases'. The only distinction is that in *Sleath*, the driver, instead of going direct to the stables, drove four miles away; in *Mitchell*, having arrived at the stables, he drove off to Euston Square. Cresswell did not attempt to reconcile the present decision with 'the case said to have been decided in the Court of Queen's Bench', but rested it on the short ground that 'the man was doing something which he knew to be contrary to his duty, and a violation of the trust reposed in him . . . when he started upon the unauthorized journey'. Williams 'would have been extremely sorry if any authority could have been found which would compel us to hold that this man was, at the time of the accident, which occurred through his breach of duty and negligence, acting in the employ of the defendants'.

It is difficult to avoid the conclusion that *Sleath* v. *Wilson* was wrong, and proceeded on a pedantic application of Parke's rule in *Joel* v. *Morrison*. The driver had substantially, if not mathematically, finished his master's work when he drove off. It was not in the course of driving the horses home that, having practically reached home, he undertook a four-mile journey with them.

In 1868, the Common Pleas were faced with the problem.[1] The driver (contrary to orders) went home to dinner, with his cart, and damaged some railings. This was 'a small détour': and on the strength of Parke's dicta and Erskine's case, the Court held the defendants liable.

The point was thus left in an unsatisfactory condition. *Storey* v. *Ashton*[2] straightened out the position. Here the deviation actually occurred before the return to stable, and yet the master was absolved. The driver set off, when

[1] *Whatman* v. *Pearson*, L. R. 3 C. P. 422.
[2] (1869) L. R. 4 Q. B. 476.

a quarter of a mile from home (defendant's office and stables), to drive in another direction on business of a companion (clerk to the defendants). Incidentally, he ran over a child. Thus we have a decidedly stronger case than *Sleath* v. *Wilson* for holding the employer liable: indeed the case seems to come well within the language alike of Erskine, and of Parke upon whom Erskine relied. Cockburn, however, laid down as the true rule, that 'the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant'. He was 'far from saying that if when going on his master's business he took a somewhat longer road, that owing to this deviation he would cease to be in the employment of his master, so as to divest the latter of all liability: in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey, which had nothing at all to do with his employment; . . . he started on what may be considered a new journey entirely for his own business, as distinct from that of his master, and it would be going a great deal too far to say that under such circumstances the master was liable'.

There seems a curious overlapping in this argument. First his lordship lays down that it is a question of degree as to what constitutes a deviation and a separate journey: then he says that this consideration does not arise, because this is evidently a separate journey *apart* from questions of degree. The true clue to his meaning appears to lie in the fact that the conveyance had so nearly reached home that it would be contrary to all sense of proportion to represent the new journey as a deviation. 'If he had merely been going a roundabout way home', says Lush,

'the master would have been liable, but he had started an entirely new journey on his own or his fellow servant's account.'

The distinction thus appears to reside in the abruptness of the departure from the natural course of things. Some deviations are independent journeys : they have a definite object, in a marked direction away from the proper terminus. Others may be independent journeys if they involve alteration of course of sufficient magnitude, though roughly in the right direction. Subtleties such as these are the inevitable consequence of an unnatural conception.

A driver may be simultaneously on his master's business and his own. If any part of the business is the master's, *Patten* v. *Rea*[1] shows that the master will be liable.[2] If the master's interest is only ancillary, *Cormack* v. *Digby*[3] shows that he may be absolved. Probably the true distinction is whether the master had control of the enterprise or not,—whether he had power to dictate how it should be carried out. In *Cormack*, the servant borrowed the horse and cart, and was clearly not acting as servant at the time : he was 'off' for the day. Any commission which he might execute for the master in the course of his amusement he would execute not as his servant but as his acquaintance. In *Patten* v. *Rea*, the casual way in which the servant acted was the way in which he was accustomed to do his work—mixing up his master's affairs and his own. It might have been better if *Patten* v. *Rea* had been otherwise decided. The mere utilization of his journey, undertaken for quite different objects, to collect a debt

[1] (1857) 2 C. B., N. S. 606. *Sed* cf. *Lygo* v. *Newbold* (1854) 9 Ex. 302.

[2] *Sammell* v. *Wright* (1805) 5 Esp. 264, *e converso*, shows that an injured party retains his right in such a case, against the job-master, whose servant 'still has the care and direction of the horses'—in Ellenborough's words.

[3] (1876) 9 I. R. C. L. 557.

due to the master, ought not to have enabled the servant to entail on the latter liability for all his extravagances.

The principle that a coachman who drives about on his own affairs does not render his master liable was strongly affirmed in *Sanderson* v. *Collins* [1904] 1 K. B. 628. It had been somewhat weakened in *Coupé Co.* v. *Maddick* [1891] 2 Q. B. 413, in which the coachman had made an unauthorized deviation; and the master was held liable *in contract* for injury done to the carriage in the course of it.

No doubt this principle would be applicable to many other cases besides deviations in driving. But there are no signs of the doctrine being worked out on any consistent theory.

Yet it is on some such theory of deviation that a somewhat curious limitation on the liability of employers (and partners) occurs in the case of prosecutions by servants and partners. There is a lingering feeling in the Courts that, whilst it is the duty of such persons to protect their principal's property, the moment it is secure their concern with the matter ends. They are acting on their own account if they decide to prosecute or to effect a capture. This seems illogical. The protection of the principal for the future, by means of a prosecution, may be well within a servant's competence. Some of these cases have already been referred to as instances of trespass.[1] Others may here briefly be discussed.

According to an early Scots case,[2] decided by Eldon C. on appeal, a partner who maliciously prosecutes a person for an alleged theft of partnership property does not involve his co-partners. 'At a sale of the thinnings of Lord Rosebery's woods near the Queen's Ferry, the appellants and respondents purchased several lots. Arbuckle and his servant in bringing home this wood, by mistake, as appellants maintained, fixed upon a lot belonging to the Taylors (respondents), and carried with them some

[1] *Supra*, pp. 101, 104. [2] *Arbuckle* v. *Taylor* (1813) 1 Dow, 160.

small trees worth about 10*s.* out of it. Wm. Taylor, one of the partners . . . wrote to the Fiscal to prosecute Arbuckle for theft in his (Taylor's) name.' Lord Bannatyne assoilzied the firm of Taylor and Sons, and the partners as individuals, who had taken no part in the proceeding, and therefore were not liable. On appeal, Eldon C. observed : ' It is a singular thing, to be sure, to be contended, that if an individual thinks proper to prosecute for stealing property which belonged to that individual and others in partnership . . . it is therefore to be dealt with as a prosecution by all the individuals in that partnership', and held that the interlocutor assoilzieing the partners was indisputable.

But this might be justified on the grounds of *Hanson* v. *Waller* [1901] 1 Q. B. 390, that ' the act not being reasonably necessary for the protection of the master's [co-partner's] property ', the defendant was not liable. However, it is not certain that *Hanson* v. *Waller* was rightly decided. A barman was given into custody on a charge of stealing whisky, by a manager invested with the entire control of a tavern. ' The master's property was safe before the plaintiff was given into custody.' True, but the arrest had to be immediate if an example were to be made. In *Stevens* v. *Midland Counties Ry. Co.* (1852) 10 Ex. 352, however, Baron Martin decided against the plaintiff on the same ground, that prosecution was not the function of a manager. Alderson had in the same case held that it was a deliberate and malicious wrong for which a master could never be liable without express instructions.

It is true that Fry J. dissented in *Edwards* v. *M. Ry. Co.* (1880) L. R. 6 Q. B. D. 287 from Alderson's opinion, and supported his views by reference to *Whitfield* v. *S. E. Ry. Co.*[1] and *Green* v. *L. G. O. Co.*[2] But that left Martin's ground untouched. The facts in *Edwards's* and *Stevens's* cases were

[1] (1858) E. B. & E. 115. [2] (1859) 7 C. B., N. S. 290.

indeed very similar. But it seems possible to distinguish them. The prosecution in *Stevens* was months after the occurrence. The prosecution in *Edwards* may have been contemporaneous and necessary for the protection of the Corporation's property. It is also possible to distinguish it from the case of another *Edwards*, *E.* v. *L. & N. W. Ry. Co.* (1870) L. R. 5 C. P. 445, in which the company were absolved from the consequences of the zeal of a foreman porter acting as stationmaster, exercised not in the protection of their own property, but in supposed protection of property of which they were bailees.

Stedman v. *Baker & Co.* [1896] 12 T. L. R. 451 is another case in which a prosecution by a restaurant manager was regarded as his own affair.

The question of prosecution again came up in *Bank of N. S. W.* v. *Owston* (1879) 4 A. C. 270. It was held not within the scope of the acting manager of a bank to prosecute a merchant on a charge of stealing a bill of exchange under somewhat peculiar circumstances, evidently not calling for immediate action. The case is interesting as indicating that in the opinion of the Privy Council the duties of servants may be enlarged in a case of emergency. Their lordships' expressions cannot, however, be pressed to show that in cases of emergency a servant can travel outside the scope of his duty, so as to make the master liable.[1]

We may close by repeating that for negligence, however gross, done in the furtherance of the servant's work, the master will always be rendered liable. For wilful wrongs, on the other hand, incidental to the furtherance of the servant's work, the master will not necessarily be liable. He will only be liable if he can be supposed to have authorized them. And to have authorized a class of acts is not *necessarily* to have authorized the illegal acts of that class.

Illustration may be afforded by *Smith* v. *Martin and*

[1] p. 143, *infra*.

Hull [1911] 2 K. B. 775.[1] A teacher, payable and dismissable by the Hull Corporation, in the course of her employment negligently told a child in her class to attend to the fire in her lunch room. This was held to be within the scope of her employment, and not to be an independent act done for her own purposes. This may be right ; her position was analogous to that of an upper menial servant, who has a certain control over the actions of the under-servants, which he can exercise for his own benefit whilst it is still 'for the benefit of' the master, being what he is employed to do. 'The position of the teacher is peculiar in this respect, that immediate obedience is expected on the part of the children' (per Lord Moulton, p. 782). And again, 'She may well have thought it was in the interests of her teaching that . . . it was better that she should send one of the scholars than that she should leave the class unattended to while she did it herself' (p. 783). But, although she may have thought so, it was not proved that she entertained any such idea : and as we have already suggested, the liability might perhaps better have been founded on the contract to employ careful teachers.

Two cases decided in 1912 may also be worth mention. In one (*Houghton* v. *Pilkington*, 3 K. B. 308) a stranger helped a milkman to place his injured assistant into the milk-cart after an accident. She volunteered to help him home with the injured boy ; her offer was accepted, and, by driving off before she was safely settled in the cart, the milkman threw her out. It was decided that the driver had no 'implied authority' to invite her into the cart.[2] The decision was based on *Cox* v. *Mid. Counties Ry. Co.* (1849) 3 Ex. 268, where the Company were held not liable for the fees of a surgeon called in by a stationmaster. But that was a case of contract : and while it might be quite true to say that an emergency does not invest a servant with authority to contract, it remains equally true that

[1] p. 132, *supra*. [2] Cf. *Peebles* v. *Cowan*, p. 169 *n.*, *infra*.

a servant does not cease to be acting in the course of his employment because an emergency arises in the course of it. We have here an illustration of the vicious tendency of looking for a quasi-contractual 'authority'. In point of fact, the case being one of negligence, all that need have been decided was that the driver was still acting as the defendant's servant. Whether he had or had not authority to invite the plaintiff into the cart was beside the point.

In the other case of 1912 (*Irwin* v. *Waterloo Taxicab Co. Ld.*, ibid. 588) the question arose of an act done for the servant's private purposes. It is known that if a cabman improperly takes out his master's cab for his own purposes, the master will not be liable for the consequences. And it is presumed that if the manager orders a cab to be taken out for his own purposes, and by his own negligence (e. g. by ordering it to be over-driven) causes damage, his employer will no more be liable. But if the manager takes it out for his own purposes, and the driver is negligent, is the employer liable for resultant damage? In other words, is the driving 'within the scope of the driver's employment'? Clearly it is his duty to obey the manager's orders. It was rightly held that the employers were liable.

The case is satisfactory inasmuch as the irrelevant topic of 'authority' was not mentioned. Counsel and bench (Williams, Moulton, and Buckley L. JJ.) alike rest the case on the question of function and not of authority.[1]

The substitution of the rigid and precise doctrine of authority (tempered by estoppel) for the elastic conception of 'course of employment' leads sometimes to unexpected results. In the extraordinary case of *Riddell* v. *Glasgow*,[2]

[1] Needless to say, the 'authority' of the upper servant to give orders to the subordinate is a different sort of authority from the wrongdoer's 'authority' to do wrong.

[2] (1910) S. C. 693; [1911] A. C. 209.

it was held that a rate-collector's 'authority' extended only to collecting, and not to argument and expostulation with householders.

The question of the liability of the master for the conduct of persons engaged or allowed by the servant to help him in his work raises some difficulties. In *Gwilliam* v. *Twist* (1895, 2 Q. B. 84) a sudden emergency arose incapacitating the driver of an omnibus from driving. He engaged a bystander, and it was held on the facts that the proprietors were not liable for the latter's negligence. Lord Esher was inclined to doubt whether a servant can ever have authority to delegate his duty so as to involve his master in the consequences of a third party's negligence except in the very special case of a ship-master. There are really two questions involved—(1) is the servant acting in the scope of his employment when, in an emergency or otherwise, he engages some one else? (2) does that engagement make the latter the servant of the master, or only his agent?

In *Ricketts* v. *Tilling* (1915, 1 K. B. 644) an omnibus driver allowed the conductor, who was seated beside him, to drive. It was held that this constituted negligence on the part of the driver himself in the exercise of his functions (Atkin J. had absolved the defendants on the ground that the conductor was not their servant to drive the omnibus). In *Beard* v. *L. G. O. Co.* (1900, 2 Q. B. 530), there was no negligence on the part of the driver: the conductor assumed control on his own account. The word 'authority' is used in this case in the sense of 'employment'.

Pickford L. J., in *Ricketts* (p. 650), declares his entire acceptance of the proposition that, in order to make the owner liable, there must be negligence on the part of the person for whose acts the owner is responsible—*his servant*, either regularly or for that occasion only.

CHAPTER VIII

JUSTIFICATION IN ETHICS

We have now traced the doctrine down to its most modern development. It remains only to glance cursorily at its speculative justification.

Blackstone draws a sufficiently absurd parallel between the doctrine as so stated, and the Roman law *de eiectis et effusis* for which he refers to Inst. IV.

Probably the true fountain of the liability was not the legislation *de eiectis et effusis*, but the much more general text *Nautae, Caupones* and the *actio de recepto*. Here we find the actual limitation to the 'scope of the employment' implicit. 'Debet exercitor omnium nautarum suorum, . . . factum praestare: nec immerito factum eorum praestat, cum ipse eos suo periculo adhibuerit. Sed non alias praestat quam si in ipsa nave damnum datum sit: ceterum si extra navem, licet a nautis, non praestabit' (Ff. 4. 9. 7. pr. *per Ulpianum I. C.*). 'Sed si quid nautae inter se damni dederint, hoc ad exercitorem non pertinet' (ib. 2). And the curious reason is given exonerating the employer from any but a noxal action in respect of his own slave-sailors:—'Nam cum alienos adhibet, explorare eum oportet, cuius fidei, cuius innocentiae sint:[1] in suis venia dignus est, si qualesquales ad instruendam navem adhibuerit' (ib. 4). And of course an innkeeper or shipowner was not liable for his servant's delicts towards the outside world, and only in a very limited manner towards his guests, namely in respect of the security of their goods

[1] And so in Ff. 14. 1. 1. 2 'culpa et dolo carere eos curare debet'.

brought in or put on board. Still the resemblances are sufficiently striking.

Lord Raymond gives two reasons in *Boucher* v. *Lawson* (1730)[1] for the liability of carriers : ' These cases depend on two grounds : First, that the owners appoint the masters ; and secondly, that the freight comes to the owners.' These are tantamount to what we have ventured to call the argument from Control and the argument from Profit. There are also the argument from Revenge (according to which the employer buys off his servant as he bought off his slave), the argument from Carefulness, the argument from Identification—the owner does what his employer does. Of all these, the last is an inane fiction, the second and the third fail to account for the unlimited nature of the responsibility, the fourth fails to account for the fact that no diligence will avail the employer, and the first will not bear examination.

A sixth ground is Eyre's, in *Bush* v. *Steinman* : that of Evidence. It is difficult to prove exactly who directed the damage, but you can tell whose servant did it. A seventh is Bacon's : that of Indulgence. It is a great concession to have servants. Similar to this is Sir F. Pollock's suggestion ('Essays in Jurisprudence and Ethics', p. 125) that it is a specially dangerous thing to embark in business, to be regarded as involving a profound responsibility, like keeping a wild animal, though not so extensive. It involves an obligation, not to insure, but to insure reasonable care. This leaves out of sight the great favour shown to business by the law ; and it does not account for the fact of domestic and other servants not employed in business entailing an equal liability on the master ; though the learned author makes the transition from business to pleasure with some agility (p. 126). And a ninth ground is that servants are an impecunious race :

[1] Cunningham, 147. Ca. tem. Hardw. 85, 194.

'Should we nowadays hold masters answerable for the uncommanded torts of their servants if normally servants were able to pay for the damage they do?' (Pollock and Maitland, Hist. Eng. Law, ii. 532). We may tabulate the hopeless groping as follows (cf. Higgins, *Employers' Liability, passim*) :—

1. Control.	Raymond, Grove (?), Erskine (?), Gierke, Dalloz, Sourdat, Brougham.
2. Profit.	Raymond, Gibbs, Best, Brüns, Wright.
3. Revenge.	Holmes, Lowe, Bramwell.
4. Carefulness and Choice.	Pothier, Robertson, Laurent, Demolombe.
5. Identification.	Wigmore (?), Blackburn, Glenlee.
6. Evidence.	Eyre, Cranworth.[1]
7. Indulgence.	Bacon.
8. Danger.	Pollock, Löening.
9. Satisfaction.	Maitland (?).

A doctrine which is accounted for on nine different grounds may reasonably be suspected of resting on no very firm basis of policy.

Wigmore puts the modern development down to a theory of 'Implied Command'. Just as the employer had been liable before for what he had expressly ordered, so now he was to be liable for what he had implicitly ordered. There are indeed few traces of such a development in the old books—it is scarcely scientific to found a specific title on loose dicta, picked out from others (much more numerous) which refer to other considerations. But in Wigmore's view, there is, all down the ages, no general theory of the master's non-liability. He is always liable :

[1] In *Bartonshill Coal Co.* v. *Reid* (1858) 3 MacQ. 285.

first of all, for his dependants; later, for what he commands; and lastly, for what he 'implicitly' commands. At no time is his liability put on any rational basis : it is just because it happens so, that people take it into their heads to consider him liable in each case. Sometimes it pleases a people to consider a person liable because his household dependant has done an injury.[1] Sometimes, and equally irrationally, it pleases them to hold him liable for what he has commanded and so directly brought about. It only seems more rational in the latter case, because we happen to share their mode of thought.

This is a Pyrrhonistic view, in essence destructive of all reason and argument, which presuppose a common stock of ideas.

Historians, like travellers, are fond of the marvellous. If they find traces of any institution which seems to contradict all the moral tendencies of human nature, they are loth to part with it, even though it involves imputing to the English of the fifteenth century a strange affection which made them entertain a curious desire to hold a master liable for all the eccentric acts of his servants : this they are ready to do on the slenderest evidence, and they tell the sceptical to be modest, and to remember that he cannot apply his standards to a bygone age of mystery.

Moreover, Wigmore's theory will not fit the facts. The master cannot be said to have implicitly commanded, who has expressly forbidden. Yet he is just as fully liable for the effects of his servant's disobedience.

The evidence in the Select Committee on Employers' Liability (Parl. Papers, 1876 (Cd. 372)) contains the opinions of Ilbert, Bramwell, Esher, J. Brown and R. S. Wright. They, of course, concern principally the

[1] But 'we cannot believe that either law or morality was guilty of any theory of "identification"' (Pollock and Maitland, Hist. Eng. Law, i. 530).

question of an employer's liability to servants for the acts of fellow servants. But some discussion is expended on the general rule. Ilbert considers it ' a just law, but often a very hard one ' : rather a contradiction in terms—justice ought not to be felt ' very hard '. His further remark that the proposition that the master is bound to warrant the competency of his servants is ' in a great measure one which nobody disputes ', is not precisely elegant, but it is apparent what he means.

Ilbert supports his position by a reference to foreign lawyers. Thus Brüns, observing that the responsibility of the employer has little place in Germano-Roman Law, places its justification on the ground that the employer who makes profits by means of his servants should sustain the losses occasioned by them to others—a reason which we venture to style thoroughly opportunist and unjuridical. He adds that legislation had introdueed a liability in the case of carriers,[1] railways, mines, quarries, pits, and factories. R. S. Wright,[2] before the Committee of 1876, takes the same theoretical ground : his first and best argument is, however, that he thinks all ' eountries have found it necessary to introduce some such rule '. He expressly abandons the *qui facit* maxim. He ' very much doubted whether society could go on ' without the rule, which he admitted at the same time to be very modern.

The Code Civil (Art. 1384) introduces a certain liability on the part of parents, teachers, and employers—but only in case they are unable to show that they could not have prevented the act complained of. Ilbert says that the Italian Code follows this. We elsewhere examine the laws of foreign countries, from which investigation it will appear that the rule of the master's liability is not nearly so widespread as Ilbert and Wright seem to have eonsidered it.

[1] By the Commercial Code.

[2] By Imperial deeree of June 7, 1871.

Joseph Brown, Q.C., giving evidence before the same Committee,[1] expressed the considered view that the general law of a master's liability for the acts of his servants was essentially unjust. 'The present law is Lord Holt's making: the Legislature did not make it.' And Bramwell gave utterance to the following striking remarks, speaking of the notion that there is a sort of natural right of this kind:

'I do not agree with the notion that seems to be entertained, that the right of action against the master for the negligence of his servant is a sort of natural right, to which there is this anomalous exception.[2] . . . For my own part, I have never been able to see why the law should be so,—why a man should be liable for the negligence of his servant, there being no relation constituted between him and the party complaining. It cannot be because he puts the means of doing a mischief into the servant's hands; for if the servant does the act wilfully, the master is not liable. And it cannot be because he is doing something on my behalf [because an independent contractor is not liable].'

The only reason which he can suggest—not being gifted with Wright's capacity for faith in what he understood to be usual throughout the world—is that the rule was borrowed from the noxal surrenders of Roman Law. He adverts to the argument that the rule ensures care on the part of the master. But he points out that it does not: it absolves him from the consequences of employing a badly-conducted person who will commit wilful misconduct with the master's articles of which he has control. 'It would be a very prudent thing, I have often thought, for a man to job his horses and coachmen, and not to have them of his own.'[3] His great wish in giving evidence was to state his opinion that the common notion that there is a natural right to damages against a master is an unfounded one.

[1] *Ut supra*, 1877 (Cd. 285), p. 38. [2] 'Common employment.'

[3] Vide *supra*, p. 33 *n*.

Bramwell's view was confirmed by Brett (afterwards M. R.). 'I cannot but say', he replied, when questioned by the Chairman (Lowe), 'that I accede entirely to that proposition.'[1] 'I do not myself think that that principle of law [the liability of employers] is altogether a just one, or is founded upon any really good reason.[2] . . . I think the law of common employment is a bad exception to a bad law.'

The Committee's Report, obviously prepared by Lowe, adopts the theory that the analogy of the Roman Law of noxal surrender 'might explain, if it did not justify, the [English] law', thus suggesting that justification was not easy.

So F. Cunningham, in Harvard Law Review (1906), p. 445, observes: 'That there could hardly be greater injustice than to take *A*'s property and give it to *B*, because *C* has injured *B*, seems clear,—yet that is the result of the maxim *respondeat superior*, plainly stated. It does not help the matter to explain that *C* was . . . doing *A*'s work at the time.' And he quotes Jessel as saying that the doctrine had been carried by the common law courts 'quite far enough' in this direction.

This was in *Smith* v. *Keal*, (1882) 9 Q. B. D. 351. 'I doubt,' adds Jessel, 'if I had a law to enact on the subject, whether I should carry it so far.' Mr. Cunningham argues that the doctrine has no place in the law of Admiralty, and styles it flatly 'unjust'.

Had the present-day liability of masters for servants (as O. W. Holmes thinks) been a clear survival of the liability of masters for slaves, it is inconceivable that it should have suffered such eclipse before blazing forth again in A. D. 1700.[3]

[1] p. 113. [2] p. 115.

[3] Cf. Pollock and Maitland, Hist. Eng. Law, ii. 528: 'Any theory that would connect our "employers' liability" with slavery has a difficult task.'

Nor is it clear why it should have died out entirely with regard to children who, like slaves, are under the immediate control of the head of the household.

The identification theory is severely and justly criticized by Holmes.

'This constructive responsibility', says Lord Fraser,[1] 'on the part of the master, being undoubtedly a departure from the broader principle of law which holds every man liable to answer for his own wrong, and not for those of others, is to be regarded with jealousy, and not extended beyond the class of cases to which it is strictly applicable.'

In the remarkable case of *Bolingbroke* v. *Swindon Local Board* (1874) L. R. 9 C. P. 574, Keating J. was prepared to hold that it was not 'within the scope' of a servant's employment to cut bushes on a neighbour's land for the purpose of clearing his master's ditch. Grove J. said that there were some things 'so naturally to be expected' that they might fairly be said to be 'within the scope of the employment', inferring that others were not. Holmes points out that this is only revolt from the theory that the acts of the agent are the acts of the principal. On that theory unlikely acts are just as much grounds of liability as likely ones.

'I assume', says Holmes,[2] 'that common sense is opposed to making one man pay for another man's wrong, unless he has actually brought the wrong to pass . . . has, i. e., induced the immediate wrongdoer to do acts of which the wrong (or, at least, wrong) was the natural consequences under the circumstances known to the defendant.' He proceeds, 'I therefore assume that common sense is opposed to the fundamental theory of agency'. Holmes adds that no doubt the 'apparently wholesome check which this theory presents itself as exercising on the indifference and negligence of great

[1] 'Law of Master and Servant', p. 151. [2] 5 Harv. L. R. 14.

corporations does much to reconcile general opinion to it'. But on the whole the great lawyer concludes as follows :—

'A judge would blush to say to a defendant: "I can state no rational ground on which you should be held liable ; but there is a fiction of law which I must respect, and by which I am bound to say that you did the act complained of, although we both knew perfectly well that it was done by somebody else whom the plaintiff could have sued if he had chosen, who was selected with the utmost care by you, who was in fact an eminently proper person for the employment in which he was engaged, and whom it was not only your right to employ, but much to the public advantage that you should employ." That would not be a satisfactory form in which to render a decision against a master, and it is not pleasant even to admit to oneself that such are the true grounds upon which one is deciding. Naturally, . . . judges have striven to find more intelligible reasons, and have done so in the utmost good faith.' [1] Unger (Higgins, p. 41) finds the doctrine 'unusual and extraordinary' : while Wäntig and Willems think it ought to be limited to shifting the burden of proof (*ib.*, pp. 30, 60). 'No subpoena lies', says the author of the *Little Treatise*, 'for offences done by a man's servant without his assent, though the master is in conscience bound to repair them.' This was the learned writer's personal opinion : Kerly (Hist. of the Ct. of Chancery, 92) holds that 'the modern opinion is that the common law has outrun the demands of conscience on this head'.

The above array of notable names, met by no real argument, is not to be lightly thought of. If Bramwell is suspect, Holmes, Esher, and Jessel are three of the greatest luminaries of modern jurisprudence. In hard fact, the real reason for employers' liability is the ninth : the damages are taken from a deep pocket. The present is not a very propitious time for withstanding a dogma based on such a principle. But a return to simpler manners will probably bring with it a return to saner views of liability, even if it is not sooner recognized that to injure capital is to injure industry.

[1] F. W. Hackett has expressed the same views (7 Harv. L. R., p. 108).

CHAPTER IX

SCOTLAND AND FOREIGN COUNTRIES

1. Scotland

In Scotland, the origin of the principle is obscure. It seems, moreover, to be recognized that express orders forbidding the wrong will assoilzie the employer. It almost would seem that we have, a hundred years later, a repetition of the English cases of the Holt era. In 1812 (June 10, F. C.) we find a master liable for the spreading of a fire which he had actually authorized to be lighted;[1] in 1817 (May 14, F. C.)[2] a master was held not liable for the damage done by the fall of a tree which his ground officer (without special directions from him) was negligently felling. In the latter case, though counsel laid down the English principle, they could cite for it no Scottish authority earlier than 1798 (February 6: *Innes* v. *Edinburgh Magistrates*). And it was observed on the other side that to find a master liable for the negligent performance even of acts which he has specially authorized 'is a stretch of presumed delinquency, a good way beyond the rules of natural justice (*Bankton* I. ii. § 30)'. Much more is it 'a violent stretch of constructive obligation' to make him responsible for the servant's fit discharge of his general or permanent duty. The exceptions introduced for the sake of expediency to the general rule *culpa tenet suos auctores* are, it is observed, very few. They are: (1) cases of contractual liability, where through the default of a servant work which the master has undertaken has been

[1] *Keith* v. *Keir.*

[2] *Linwood* v. *Hathom.*

improperly performed ; and (2) cases where the master knows of the servant's unfitness.[1] '*But the general rule [of non-liability] applies, where no contract can be pleaded, and where no blame is imputable to the master.*'

Counsel are able to cite authority. *Galbraith* v. *Anderson* (12 Jan. 1617, Kerse) ; *Murislaw* v. *Haliburton* (28 March, 1623, Haddington). These cases appear to establish liability when the servant was hired for a term, but *Campbell* v. *Barrie* (15 July, 1748, Kilkerran), *Thorburn* v. *Ellis* (24 May, 1811), Stair (I. ix. § 5), and Bankton (IIII. ii. § 30) deny it altogether.

' In general ', says Glenlee, S. C. J., ' it is perfectly impossible to think that, with any care, all accidents can be prevented ; if you avoid those that are most likely to happen, and take proper precautions for others, this is all that can be required. I don't see how the common operations of life could go on otherwise—if a man could never do anything without risking his fortune from some accident that may happen. . . . Suppose the accident had happened in this way—that the head of the hatchet had flown off and killed the man ; this might have been very careless on the part of the woodman, as he ought to have seen that it was secure, but is his master to be liable because he should have told him to go to the smith ? That is one of those things which it is unreasonable to exact ; and it ought not to come against the master, but the individual guilty of the negligence.'

On the whole, however, Lord Glenlee took the occurrence to have been a pure accident. Bannatyne S. C. J. laid down the modern rule :—

' The tree was cut down by certain persons in [the defender's] employment. I cannot think that, if they acted improperly, the proprietor must not be liable. The operation could not be done without hazard ; and he trusted to their prudence ; and however much I may regret it, he must be liable.'

[1] We may add, cases where, independent of contract, there is an absolute obligation on the employer.

Then his Lordship quotes *Keith* (just as Holt had quoted *Turberville*) : and thus lays down novel doctrine on the assured basis of a gross mistake. Craigie S. C. J. concurred ; but the Lord Justice Clerk (Boyle) demurred to such law.

' It will not do, where the liability is to be brought home to a proprietor, to say that it must be presumed to be done by his order : because it would follow, that whatever is done, either with or without his consent, he is to be liable for the consequences. This is not founded in the law of Scotland, nor in the Roman law, nor, I will venture to say, in the law of any civilized country : because, if an act done in direct opposition to his orders is to subject him to an assythement, it would be establishing a doctrine requiring a long train of decisions to establish. On the case of *Lord Keith*, if it is correctly reported, I must just say that, with all the respect I have for the other Division, I hope it is allowable for me to hesitate as to the propriety of the decision, because I understand from the report that the burning was in opposition to the orders of Mr. Keir ; [1] and yet it is said that the court were clear that he was responsible. It appears to me a very special case, and too much caution cannot be used in following it as a precedent. If it is meant to be laid down, in general, that servants acting in opposition to orders are to subject their masters, I cannot accede to the doctrine.'

His lordship quotes the cases of *Caddel*, where the master knew of the danger ; of *Brown*, where he allowed a drunken postilion to drive ; [2] of *Milne*, where he authorized a dangerous building operation, and took no precaution ; of *Innes*,[3] where it was a public duty of the defenders to guard against danger.

Bannatyne S. C. J. did not contradict the Lord Justice Clerk's doctrine. But he replied that it ' would require consideration ' : take the case of damage done by the fault of a stage-coach driver, or of the driver of a private

[1] This was not so : the editor of Erskine, citing *Baird* v. *Hamilton* (4 S. 790), *infra*, p. 159, says the report was wrong, and that Keir authorized the fire. [2] *Infra*, pp. 158, 160. [3] *Supra*, p. 155.

carriage. Certainly there is a contract to carry safely in the first case : but even in the latter, his Lordship thought that the master would be liable—' at least, the question would require consideration '.

Consideration : and in 1817.

The Division then assumed Robertson S. C. J., who agreed with the Lord Justice Clerk and Lord Glenlee.

'No doubt there are cases, and not a few of them, in which a person is liable for the damage occasioned by the carelessness of those employed by him. This is the case of artificers, of owners of a ship . . . and a proprietor of a stage-coach. . . . But I apprehend that in all these cases the liability arises *ex contractu*, incurred in consequence of his having failed to fulfil the object which he contracted for. . . . There is no such contract in the present case.'

His Lordship then adverts to the absolute duty which arises in connexion with intromissions with urban tenements, and concludes :—

' If we were to go the length of saying that a proprietor of a large estate is to be liable in damages for every piece of work done by persons on his estate, without any direct command, I apprehend we would be laying the foundation for a dangerous doctrine indeed.'

This is a remarkable decision, inasmuch as already in 1813 the Second Division (Boyle, Meadowbank, Pitmilly) had been[1] clearly of opinion that when damage was sustained by the unskilfulness, malversation, or culpable negligence of servants, in matters entrusted to their care, the masters are liable. And the management of an estate is evidently entrusted to the ground man.

Linwood was upheld by the House of Lords.[2]

In January 1822, however, we find a running-down case, in which the Court, overruling Lord Gillies, allowed

[1] February 26, F. C. *Brown.*

[2] 1 Shaw's Ap. Ca. 20 (March 19, 1821). This report gives the facts in far the best detail.

a proof against the employer.[1] The same doctrine was applied in June.[2] And in 1826, we find Lord Glenlee acceding to the new doctrine, in *Baird* v. *Hamilton* (4 S. 790),[3] a running-down case. Here, for the first time, we get the arguments and opinions stated. *Fraser* is explained by counsel as having turned on the employer's personal negligence in entrusting one man with two carts and four horses, and cases of coach accidents such as *Anderson's* as being *ex contractu*.

Lord Glenlee's opinion is surprising, in view of his strong views in *Linwood*. He appears to rest the liability on the fact of damage having been done with the employer's property. 'There is something founded in our nature which views the mere connexion of *dominium* as inferring a liability for injury done by anything which is our property. I do not justify the feeling, but it is a natural one . . . nor is it a sufficient defence to say "I hired a servant to attend to it". The master is liable for the carelessness of his servant.' Lord Robertson concurred, on the ground that masters must employ careful servants (though there was nothing previously against this one). Lord Pitmilly distinguished *Linwood*, where there was no specific order to fell the tree, and relied on *Fraser* and *Keith*. Lord Alloway thought (like Mr. Ilbert) that 'if there is any one point fixed by the general law of Europe, it is the liability of a master in a case like this', which may surprise some. The Lord Justice Clerk also went back on his decision in *Linwood*, and conceived that a master was an insurer of the carefulness of his servants.

This is a remarkable *volte-face*; and after the conversion

[1] *Fraser* v. *Dunlop*, 1 S. 258.

[2] *Anderson*, ibid. 474. We only mention *Howey* (1826) 4 S. 752, because of its great similarity to the English case of a carrier who took up an unauthorized piece of luggage. *Middleton* v. *Fowler*, p. 25 *sup.*

[3] Jeffrey appeared for the employers in this case.

of Lords Boyle and Glenlee, there was no more to be said. Nine years had worked an amazing change in their Lordships' attitude. When the question of 'common employment' came to be dealt with, in the middle of the century, the new doctrine of 1826 came to be called 'the settled law of Scotland', and by that time it no doubt had become so, though in 1827 a jury declined to give damages against an employer in a running-down case (*Miller* v. *Harvie*, 4 Murray 385). Lord Cuninghame, in 1852,[1] carelessly traces the doctrine to the case of *Brown* (1813, February 26, F.C.), where an unfortunate but now illustrious hairdresser was killed in a reckless race between a chaise and the coach which was carrying him, and this seems in fact to be the earliest case of the kind in Scotland, but it clearly turned on the terms of his contract of conveyance. The proposition of liability for the 'unskilfulness, malversation, or culpable negligence of servants in matters entrusted to their care' is laid down in general terms,[2] but the case is expressly distinguished as turning on the master's fault by Lord Glenlee in *Linwood*.[3]

Lord Ivory in this case quotes an article in 34 *Law Magazine* (1845). This article ('Vexed Questions—Liability of Employer for Damage by Party Employed') is signed W. P.,[4] and deals with the refinements of the doctrine, not with the principle itself.

The law of Scotland is also so far favourable to employers that it declines to hold them civilly liable for the criminal acts of their servants, excepting *de in rem verso*.

The law of Scotland did not fail to encounter the

[1] *Baird* v. *Graham*, 14 D. 619.

[2] By Boyle L. J. C., Meadowbank and Pitmilly, SS. C. J.

[3] *Supra*, pp. 155, 156.

[4] May it have been written by William Penney, Lord Kinloch? Vide *infra*, p. 169.

difficulty which we have seen to exist in England in regard to the distinction between negligence and wilful acts. 'Malversation' of the servant was mentioned in *Brown*, as on a par with his negligence; and although this was a case of liability under a contract, the statement was repeated in general terms in the subsequent leading case of *Baird* v. *Graham*. Thus the wilful act of the servant, if done in his employment and with a view to its furtherance, was said to involve the employer: as it was phrased in *Baird* by Lord Cuninghame: 'When a servant, acting within the scope of his master's business, therein causes loss and injury to third parties, by his negligence, *or misconduct*, or ignorance, the master, in all such cases, is liable to reparation.'

The dictum was not necessary to the decision, because the gist of *Baird* was apparently contract,[1] and Lord Cowan had laid it down as Lord Ordinary that 'the master is responsible for whatever loss or damage may ensue from the *negligent* acts of his servant while engaged in the matter of his employment . . . but the master is not responsible for the culpable [i.e. wilful ?] acts of his servant, even although these may be done by him when engaged in his master's service.'[2]

'Neither here nor elsewhere', said Adam L. C. C. in *Miller* (1827) 4 Murr. 388, 'could it be held that the master is liable for the wilful acts . . . of a servant. . . . He is civilly liable for the fault, negligence, or want of skill of the servant, but is not liable for wilful acts out of the duty

[1] Permissive use of stable; an infected horse was put in it by the servant. An absolute statutory duty was involved in *Hunter* (1836) 14 S. 717.

[2] See *Dalrymple* (1804) Hume's Dec. 387, where a farm-lad abused a trespassing horse in taking it home, and the master was exonerated, none of the judges thinking that he was answerable unless he authorized or countenanced the impropriety. Cf. *Lyons* v. *Martin* (1838) 8 A. & E. 512.

he has to perform.' The last few words make the whole deliverance ambiguous. But on the whole, we find no case during this period in which liability was fixed on the master for a wilful act.

In Scotland, the Roman Law rule that shipmasters, innkeepers, stablers, &c. are liable for the thefts of their servants, is maintained. This may partly account for the fact that no necessity has been felt for the recognition of any general liability for the wilful wrongs of a servant.

In 1822 (*Waldie*, 1 S. 367) the Court had assoilzied the advocator from the breach of an interdict committed against his specific orders by his servants, in deepening a river during his absence in England; and so Lord Fraser, writing in 1872 ('Master and Servant', 169), quotes with apparent approval the New York case of *Wright* v. *Wilcox* (1838) 19 Wendell 343, where a master was exonerated when a carter shook a boy violently off his vehicle. This was held to be the servant's own affair, though it was in the furtherance of his employer's business. And his lordship criticizes *Hill* v. *Merricks* (1813) Hume's Dec. 397, which was a case very like that of *Lord Bolingbroke* (1874) L. R. 9 C. P. 575: *supra*, p. 40, only that the trespassers were servants, and the master was found liable. Lord Fraser thinks this case overruled by *Waldie*, though there the act complained of was expressly forbidden by the master. 'By the law of England', he proceeds, 'and it is thought by that of Scotland also, a master is not liable for a trespass committed by his servant, unless it can be shown to have been committed either by his *express* command, or to have been a *necessary* consequence of the orders given to him.' In *Hill* v. *Merricks* the employer was held liable for servants crossing his boundary and cutting a neighbour's trees in his supposed interests.

A curious case, decided on very special facts, occurred in 1873.[1] A shipmaster, apprehending a supposed deserter under the Merchant Shipping Acts, was held not to be acting as the servant of the owners. 'It would be something new', thought Inglis, 'if they were to be liable for a mate or consignee exercising the powers of the particular section', and why then for a captain? Each party assuming to exercise the penal powers of the section was, his Lordship thought, liable alone for his own act. *Aliter*, if the master is detaining the seaman's clothes, to answer his liability to the owners.[2] In *Gowan* v. *Thomson* (6 D. 606) a master who sailed away, leaving a seaman behind without the due certificate, was held to have done so in the owner's interests and as their servant. It is difficult to see the distinction, drawn by Inglis, that this was in the ordinary management of the vessel, whilst the act of apprehension in *O'Neil* was not. But he carried the Court (Deas and Jerviswoode) with him in supporting the Lord Ordinary (Mure).

The question of liability for a wilful (and criminal) act was raised flatly in the case of *Wardrope* (1876) 3 R. 877. His dog was shot by the Duke of Hamilton's gamekeeper. The Duke, sued by him for damages, pleaded that the act, being (1) unauthorized, (2) criminal and unauthorized, could not involve himself. The plea was sustained by Lord Deas on the ground that 'very specific averments indeed' would be required to make a master civilly liable for a criminal act done by his servant. Inglis L. P. says that it is averred that the men were acting with the authority of the Duke, and that the authority is averred to be derived from the fact that they were acting 'in his employment'. But, he observes, employment as a gamekeeper confers no authority to shoot dogs *or to*

[1] *O'Neil* v. *Rankin & Sons*, 11 M. 538.
[2] *M'Naughton* v. *Allhusen* (1847) 10 D. 236.

do any illegal act. Consequently the averments failed. Evidently, therefore, Inglis does not consider a general authority to do a class of acts as estopping a master from denying authority to do them when illegal.

In more recent years, the distinction between negligent and wilful acts appears to have been neglected. There is little authority for a period of about twenty years. A group of cases then occurred in 1898 which demand attention.

In *Maxwell* v. *Cal. Ry. Co.* (1898) 25 R. 550, the issue was allowed whether a ticket-collector used unnecessary and illegal violence 'while acting within the scope of his employment in seizing and detaining the pursuer'. This may have turned on negligence.

In *Wood* v. *N. B. Ry. Co.* (1899) 1 F. 562 railway constables were alleged to have followed a cabman with whom they had had a dispute, and assaulted and arrested him. This was argued not to be within the scope of their employment, but an issue was allowed. The point of wilful wrong was not considered.

In *Robson* v. *Hawick Sch. Bd.* (1900) 37 Sc. L. R. 306, the clerk to the board snatched from the pursuer certain papers which the board desired. This was held not within his employment. 'It is always a matter of delicacy to redd the marches between the maxims *culpa tenet suos auctores* and *respondeat superior*, but courts of law must be careful at all events not unduly to extend the cases where a master is to be held [civilly] responsible for the criminal or quasi-criminal act of a servant. Negligence is another matter, but here the area of a master's responsibility is a very limited one.' Lord Stormonth-Darling then proceeds to limit it to the case of servants who are left to judge of the *amount* of force they will exercise, in which case the employer is liable for their error in using excessive violence. And he instances the case of railway servants.

'It is idle to say that a school board engages its clerk for the purpose of using any kind of force towards the staff; . . . if he does so far forget his duty as to commit an assault, then he must answer for it himself. . . . The Board have not placed him in a position in which it can be said that he is acting with their authority.'

Lord Stormonth-Darling thus admits liability for wilful wrong if it takes the form of excess of authorized force. His Lordship apparently does not include the wilful and illegal use of force in circumstances resembling those in which lawful force might be used. Thus he would deny the applicability to Scotland of the cases in which a porter has with moderate force done an altogether illegal thing.

In *Gillespie* (1898) 25 R. 916 the Court found that a barman who assaulted a customer did so on account simply of personal irritation, and not in the discharge of his duties.

As we have seen, that is one of the two common ways of avoiding the consequences of assimilating negligence and wilful wrong.

So, in *Eprile* v. *Cal. Ry. Co.* (1898) 6 Sc.L.T. 87 a master was held not liable for slander; and in *Cameron* v. *Yeats* (1899) 1 F. 456, where a slanderous letter was written in the course of business, charging business misconduct, it was held that the onus was on the pursuer to show that it had been adopted or authorized. 'To slander any one', says Lord Young, 'is not within the sphere or region of an ordinary business.' 'The pursuer must prove', says Lord Trayner, 'that the letter was written with the defender's knowledge and on his authority.' But in his Lordship's view, the letter was not about business at all: a strange interpretation, one would think.

In a series of still later cases of quite recent date, the Scottish principle that a wilful act, even if committed in the furtherance of the employer's interests, will not involve the employer, is again clearly enunciated.

In *Agnew* v. *Brit. Legal Life Assce. Co. Ld.* (1906) 8 F. 422, Lord Ardwall expressed the opinion that even if the statements alleged to have been made by an insurance superintendent concerning a local agent were slanderous, the insurance company would not be responsible for them : ' To hold that a company or corporation or other large employer is liable for all or any libellous language rashly used by any one in their employment in the course of such an employment would be to introduce an appalling extension of the law of defamation.' And Lord Dunedin, with whom Lord Kinnear concurred, agreed that ' it is impossible not to see that to open the door for " any slanderous language " rashly used by any one in the employment of another, is to open the door very wide indeed '. He thinks that a casual wrathful expression, even if slanderous, might perhaps not involve such an employer. But here his Lordship thought there was merely abuse,[1] and no slander. Lord McLaren also thought that the limits of the principle on which the Privy Council acted in *Brown* (*supra*, pp. 158, 160) would have to be very carefully considered.

An exceptional case, in which a deliberate act was held to involve the employer, was the following.

A breeze in a hydropathic caused the action *Mackenzie* v. *Cluny Hill Hydropathic Co. Ld.* (1908) S. C. 200. The company's manager detained a boarder for a quarter of an hour in a room in order to induce her to apologize for an alleged act of rudeness to another inmate. This was alleged to be ' in the scope of the manager's employment and in the supposed furtherance of the defenders' interests '. Lord Salvesen assoilzied the defenders, but the Court of Session allowed an issue. It was within the scope of the manager's duties to promote peace and harmony among the boarders, and apparently by whatever

[1] ' Liar ' and ' fraud '.

unlawful means. The curious fact emerges that what Lord Salvesen thought a trifling wrong, Lord Low thought 'an outrage'.

In *Aiken* v. *Caledonian Ry* (1913) S. C. 66, a bar manager was alleged to have dismissed a barmaid with defamatory words, to justify his private malice, and the employers were absolved. It is plain that it was within the scope of the manager's employment to dismiss servants and to declare the cause of their dismissal. If he used the occasion slanderously and declared a false cause, it would not necessarily, I think, be held in England that he had left the course of his employment, and had embarked on a private adventure of his own. It seems to me that the Scottish view is more in accordance with the principles laid down in *Limpus* v. *L. G. O. Co.* and nominally accepted ever since, that it is the motive of the servant's act, and not its *apparent* connexion with his work, that is the decisive factor (*Lloyd* v. *Grace* may be set aside in this connexion, for it was a case of obvious contract). Lord Salvesen, in *Aiken* (*ut sup.*), indeed says: 'In the *Citizens' Life Assurance Co.*[1] the slander was published, not indeed with the employer's knowledge and consent, but with the intention of benefiting his business. The writer of the letter had no object of his own to serve. His purpose was to counteract the mischief which the plaintiff, a former employee, was doing': and no doubt that case supports the idea that a wrong (slander) deliberately done in the employer's interests may involve the master in liability.

But the Corporation of Glasgow were assoilzied in a recent case (*Lorimer-Riddell* v. *Glasgow* (1911) S. C. (H. L.) 35; [1911] A. C. 209), where a collector employed by them had, on the occasion of a dispute as to the amount of a receipt, 'become violent, and threatened to lodge

[1] [1903] A. C. 423, *supra*, p. 71.

information . . . for forgery ' in the presence of others.[1] Surely he was acting ' within the scope of his employment ', when he was putting pressure—though illegitimate pressure—upon an alleged debtor to pay, or when discussing with her the validity of his corporation's receipts ? And so the Lord Ordinary and the Court of Session thought. Here again the Earl of Loreburn speaks of the servant's ' authority ' to make charges, and concludes that he had none. But the question may be, not whether he had authority to make charges, but whether it was not in the natural execution of his authority to collect, and with his employer's interests in mind that he took upon himself to make these charges. The employment of a servant is not to be equated narrowly to the authority of an agent, who must act strictly according to the terms of his commission. According to one English school of thought the servant accepts a status, and all that is naturally done by him in the exercise of his functions entails responsibility on the master.

Lord Shaw says that ' slander was no necessary part ' of his employment. This would go a long way to exclude from Scotland the rule of a master's liability for wilful wrongs. It is no necessary part of any servant's employment to commit trespasses any more than slander. If the theory of ' implied authority ' is to be based on absolute necessity, it will become a very reasonable doctrine, but it will be cut down to very much less than the present luxuriant limits it enjoys in England. Lord Shaw's words seem contrary to *Citizens' Life Assurance Co.*,[2] and on the whole, considering the comparatively recent judgment of Lord Stormonth-Darling (*supra*, p. 164), and the whole trend of the Scottish cases, the latter case would now be difficult to support.

None of the judges contradict the proposition laid down

[1] Cf. *Arbuckle* v. *Taylor*, *supra*, pp. 45, 140. [2] [1903] A. C. 423.

by Lord Boyle in *Linwood* that a master cannot be liable for the consequences of an act which he has forbidden. It was not until 1867 [1] that a step was taken towards this. A girl was accidentally killed in a brewery washhouse, from which the brewery servants should have excluded her. Lord Kinloch [2] held these express orders an exoneration. But Inglis L. P. (with whom concurred Curriehill, Deas, and Ardmillan SS. C. J.—not a very imposing tribunal) reversed this decision. He gave no scintilla of reasoning or authority ; and the finding was unnecessary, because the case fell to be remitted on another ground. However, Inglis's obiter dictum has found its way into Bell's Dictionary, though Barclay (Principles, 1880) does not notice it.[3]

2. France and Rome

In France, the clear adoption of the principle appears to date back only to the time of the Revolution—or perhaps to that of Pothier (*c.* 1740). It appears in the Code Civil (Art. 1384) in the following form :—

'On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde . . . .

'Les maîtres et les commettants [sont responsables] du

[1] *Fraser* v. *Younger*, 5 Macph. 861. Cf. *Lumsden* (1856) 18 D. 468.

[2] 'He was remarkable not only for the eloquence of his judgements, but for their generally just practical sense and wisdom' : *D. N. B.*, s.v. *Penney, Wm.* Cf. *Law Magazine*, 1872, p. 1075, 'The late Lord Kinloch' : 'The only leader qualified to contend against . . . John Inglis.'

[3] Lord Anderson in 1915 dismissed an action as irrelevant which was brought on behalf of a boy whom a driver had ordered off a moving lorry (*Peebles* v. *Cowan* (1915) 1 Sc. L. T. 363). The driver had allowed them to get on ; and this was a thing outside his employment, because it was a thing which the master would never have told him to do. His subsequent negligence was therefore solely his own affair.

dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.'

According to Dalloz (J. G., Responsabilité, p. 422), the *préposé* is one who acts only under the orders, direction, and surveillance of the *commettant*. The *commettant* (p. 423) must have the right not only to say what the *préposé* shall do, but how he shall do it.

'La responsabilité ne dépend pas seulement de ce qu'ils ont choisi leurs préposés, mais suppose en outre qu'ils ont le droit de leur donner des ordres et des instructions sur la manière de remplir les fonctions auxquelles ils les emploient, autorité sans laquelle il n'y a pas de véritables commettants.'

This corresponds with the test which in English law distinguishes a servant from an independent contractor. The exact point arose at Paris which was decided in *Williams* v. *Jones* (1864) 3 H. & C. 256, viz. when a builder's workman smokes and sets fire to a building (*aff. Chibon*, Dalloz, J. G., 1847, 4. 423), and it was differently decided.[1]

Domestics are specially mentioned. But they are only (according to Dalloz, J. G., u. s., p. 440) a particular class of *préposés*.

In the *exposés de motifs* of this legislation there occur the usual confused arguments. Now it is the authority, now the choice, now the profit, of the employer, which is supposed to make him morally liable (Dalloz, u. s., p. 296 *n.*).

'N'est-ce pas en effet le service dont le maître profite' —he may lose by it, but let that pass—

'qui a produit le mal qu'on le condamne à réparer? N'a-t-il pas à se reprocher d'avoir donné sa confiance à des hommes méchants, maladroits ou imprudents? et serait-il juste que des tiers demeurassent victimes de cette confiance *inconsidérée*'—(observe the naïve *petitio*

[1] The French view was that he smoked in the exercise of his duties because he smoked where they took him.

principii !)—' qui est la cause première, la véritable source du dommage qu'ils éprouvent ? . . . La loi ne fait donc que ratifier . . . *ce que la jurisprudence de tous les temps* (!) *et de tous les pays* (!) a consacré.' [1]

And another tribune observed that the misdeeds of the party under authority were conclusive of a ' relâchement de la discipline domestique qui est dans la main du . . . commettant '.[2]

It was actually argued at Aix in 1832, that a regiment was liable for the acts of some of its soldiers,[3] and it is curious to notice that the liability of stage-coach proprietors was established at Rouen about the same time as in Scotland.[4]

But it would be unjust to make the Revolution solely responsible. Pothier (Obligations (1761) I. i. 2 (2)) had already asserted that ' Masters are also answerable for the injury occasioned by the delict or quasi-delict of their servants : even when they are not in a situation to prevent them, provided they are committed in the exercise of the functions in which the servants are employed '. He adds that the cause of this rule is to render masters careful in the choice of those they employ. This of course takes us to pre-Revolution days. Thouller, in his ' Droit Civil Français ' (XI. 316), cites Serpillon, Code Criminel (I. 393 sq.), for various old cases to the like effect. Pothier elsewhere (op. cit., II. vi. 4) founds on Ff. 14. 3. 5. 8, and remarks : ' Quiconque a commis quelqu'un à quelques fonctions, est responsable des délits et quasi-délits que son préposé a commis dans l'exercice des fonctions auxquelles il était préposé.'

[1] *Rapport* by de Greuille (16 pluv., an. 12), Dalloz, J. G., u. s., p. 296.

[2] ibid. p. 297.

[3] *Ambroix c. com. de Tarascon et le 2e rég. de chasseurs* (Dalloz, J. G., ' Responsabilité ', § 500). A tavern-keeper had had his premises wrecked by cavalrymen, and claimed 5,000 francs.

[4] February 24, 1821 (Dalloz, J. G., ' Responsabilité ', 188 (5)).

He gives the example of an official *commis aux aides* maltreating a *cabaretier*, thus involving in his misconduct the farmers who appointed him. This has a strong analogy to the English cases maintaining the quite exceptional liability of sheriffs for their officers. He lays down the limitation that the delict must be 'dans ses fonctions'. And it is easy to understand that an official liability must be restrained within the limits of official conduct. 'Si le commis avait maltraité ou volé quelqu'un hors de ses fonctions, ils n'en seraient pas tenus.' It might even have been doubted whether Pothier did not intend to confine the principle (about which he says very little) to the case of persons so employed to carry out public functions. 'Fonctionnaire' in modern French certainly connotes public office. It is only when one is '*commis à fonctions*' that the vicarious liability arises. But Pothier meant more than this, though one would have thought he would surely have treated the matter at greater length. From his work on the Digest we see that he was of opinion that the vicarious liability of employers was the law of Rome. True, the Roman authority on which he relies is a mere matter of contract. An undertaker's slave, employed in the business, despoils a dead body. Although the delictual actions *furti* and *iniuriarum* are both competent in a noxal form, Labeo, says Ulpian, concedes the action *quasi-institoria* [1] as well [as on a breach of the undertaking contract]. It is only *ex contractibus ipsis* that the *instituens* is liable for his *institores*.

In Ff. 14. 1. 1. 2. the question of contract is carefully distinguished from delict, with regard to the *actio exercitoria* (which is closely analogous to the *a. institoria*), and it is expressly made clear that it is purely a contractual action. It is distinguished from the peculiar liability which may be incurred for the delicts of sailors.

[1] Ff. 14. 3. 5. 8 (Ulp. *Ad Ed.* 28).

'Si cum quolibet nautarum sit contractum, non datur actio in exercitorem, . . . : alia enim est contrahendi causa, alia delinquendi. Si quidem qui magistrum praeponit contrahi cum eo permittit, qui nautas adhibet non contrahi cum eis permittit—sed culpa et dolo carere eos curare debet.' [1] [Ulpian *Ad Edictum*, l. 28.]

Even in matters of contract, the scope of the employment was narrow (ib. 12).

An *actio institoria*, or *quasi-institoria*, *ex delicto* would be a violent solecism : almost a contradiction in terms. It would be impossible to construct its formula, unless it were *in factum* simply.

Labeo's dictum is perfectly intelligible. It rests upon the perennial difficulty of distinguishing the true nature of injuries done to objects with which the injurer is entrusted under the terms of a contract.[2] Has he broken the contract, or has he committed a wrong ? In the case cited, we must suppose that it is the manager-slave who has made the contract ; he has gone round and taken the order—and has then been guilty of *furtum* and *iniuria*. Of course he is liable, and his master is noxally liable, in delict. But then, a contract of *locatio-conductio operarum* has been created, in a business matter. Can the owner of the business, the master-undertaker, be held liable on it, not noxally but *in solidum*, in virtue of the contractor's failure to restore the body intact and respected ? He never contracted, it is true, and knows nothing whatever about the transaction. Therefore an *actio locati* is impossible. But the *actio institoria* . . . ?

Yes ; on the whole his *institor* has broken a contract, as well as committed a delict. And for that breach of contract, the master, being the business head, must answer. But the case lies so near the border-line : it is so complicated with delict, that the liability was doubted,

[1] *Scil.*, under the edict *nautae, caupones.*

[2] Cf. *Cheshire* v. *Bailey*, pp. 127, 129, *supra.*

and conceded as giving rise to an action *quasi-institoria* only.

There is no ground whatever for assuming a possible *actio quasi-institoria ex delicto*. The sections of the Digest dealing with the Lex Aquilia and with noxal actions would have been full of such observations if any such action had lain as on a tort. (Cf. Ff. 9, 4, 19, 2.) Indeed, the term *quasi-institoria* is usually reserved for something entirely different—the contractual action brought against a *mandans* on the contracts of a *mandatarius*. Moyle says that it is not classical: Girard implies that it came in with Papinian. (Ff. 14. 3. 19. pr.) Cf. Buckland, 'Roman Law of Slavery', pp. 122 sqq.: when slaves damaged a hired house, their owner was held liable on the contract of *locatio-conductio*, as well as noxally, by the Proculians (of whom of course Labeo was the founder). (Ff. 47. 1. 2. 3) (Mos. & Rom. ll. Collatio 12. 7. 9.)

Thouller[1] himself dissents from the doctrine of vicarious liability. We can only be liable for what we do, or for what we might have prevented.

'Nos maîtres en jurisprudence, ces jurisconsultes romains, à qui seuls, selon d'Aguesseau,[2] la justice a pleinement dévoilé ses mystères, respectèrent cette règle éternelle et fondamentale d'imputation.'

The noxal action turns on the personal liability of the slave to make satisfaction *corpore*: the action *de eiectis et effusis* depends on public order: the actions *institoria* and *exercitoria* rest on a tacit but very obvious contract. The principle of non-responsibility for others—

'ne se trouve violée que par les despotes et les tyrans, chez les peuples encore barbares, où le flambeau de raison est resté entouré de ténèbres, et chez eux encore où le fanatisme, l'anarchie, l'esprit de parti, l'ont couvert d'un

[1] op. cit. (1842. Renouard, Paris), pp. 323 sq.
[2] *Treizième mercuriale*, Œuvres i. 170.

voile qui ne permet plus de l'apercevoir, si ce n'est à un petit nombre de sages sans influence.'

Clotaire II [1] (A.D. 595) divided the population into knots of ten persons, mutually responsible—but even he allowed individuals to exonerate themselves affirmatively.[2] Thouller sets beside this species of frankpledge the law of October 2, 1795.

'Tous citoyens, habitant la même commune, sont garans civilement des attentats commis sur le territoire de la commune . . .' 'Si, dans une commune, des cultivateurs à part de fruits refusent de livrer . . . la portion due au propriétaire, tous les habitants de cette commune sont tenus des dommages-intérêts' (vol. xi, p. 331).

In fact, he proceeds (p. 359), laws imposing a vicarious liability are almost always unjust. The liability of parents for their children living with them, consecrated by the Code Napoléon, was reprobated (as a Breton custom) by d'Argentré (*Ancienne Coutume*: art. 611)—for children are sometimes indocile. So Bartolus and Cujas.[3] With strange inconsistency, Thouller sees no departure from this ethical principle in the provisions of the Code which cast a vicarious liability upon employers, though he proceeds (xi. 392) to quote ancient cases of 1657 and 1698 in which masters were absolved from liability for their servants' *independent* wrongful acts.[4]

[1] *Capitulaires*, Baluze, i. 20.

[2] Meyer, 'Esprit des Inst. judiciaires' (I. i. 8. 136).

[3] A case of September 11, 1673, is cited from *Le Journal du Palais*. Thorel, aged 14, threw a snowball at Macherel: it hit Balthus and knocked out his eye. Thorel's father was ordered to pay the damage, under the custom. There was no responsibility, however, for children *incapaces doli*.

[4] See Pearce Higgins, 'Employers' Liability', for a succinct commentary on the French law, p. 55. He observes that for acts which could not possibly be foreseen, the Brussels and (generally) the French Courts exonerate the employer.

3. Japan

The Japanese Code of 1897 (§ 715, *trans.* Gubbins) is happily against the recognition of responsibility. Although it superficially acknowledges the principle, it places the real ground of responsibility on the negligence of the employer.

'A person who employs another for the purpose of certain work is bound to give compensation for any damage caused by the latter in the performance of his work to a third person. *But this rule does not apply to cases* where the employer exercised reasonable care in the selection of the individual whom he employed, and in the supervision of the work—or where the damage would have occurred in spite of the exercise of reasonable care.'

By § 716 :

'A person ordering [i.e. contracting for] work is not liable for damage caused to a third person by the contractor in the execution of the work. But this rule does not apply to cases where the person ordering the work is guilty of negligence in respect of his order, or of the instructions issued by him.'

The law of Japan thus sensibly joins hands with the law of ancient Rome. It is still in existence (see Becker's edit., 1909 : where the German Code, §§ 831, 840 (2), is cited). The Commercial Code makes an exception in the case of innkeepers, shipowners, forwarding agents, common carriers, who are liable for want of care on the part of employees (§§ 322, 337, 350, 351, 352, 353, 354, 592 : cf. German Comm. Code, §§ 429 (1), 431, 456, 458, 485, 606, 607).

4. Germany

As observed by Ilbert, in giving evidence before the British Committee (p. 150, *supra*), the German law now recognizes exceptions for certain employments. By

§ 836 proof of ordinary care exonerates the person in possession of land from responsibility for accidents caused by defects in structures upon it. But by § 42 of the Introductory Act, the Act of June 7, 1871, creating an obligation to make compensation for causing *death* or *bodily injuries* (but only such) in the working of mines, quarries, and factories is virtually preserved, whenever the injury arises through the default of an employee. How far this applies to their wilful and independent acts appears to be undetermined. The liability of railway companies, which is virtually that of insurers,[1] is secured by the same Act.[2] By § 823 infringement of a statutory provision intended for the protection of others involves the liability to pay civil compensation only in case some fault can be attributed to the party.

These inroads on the principle of non-liability are stated by Pearce Higgins [3] to have begun with a Prussian Railway Law of 1838. It was imitated in Austria in 1869: but only very tentatively. It is said [4] that the Bavarian and Hessian Courts had held the Lex Aquilia applicable to the case of a driver's negligence. And Austrian Courts had laid down the same principle, at any rate in the cases of carriers and contractors (*conductores operis*), and perhaps in general terms 'dangerous undertakings'.[5] And see Schuster, 'Principles of German Law', pp. 156–9.

[1] Except against *vis maior*.

[2] Schuster, pp. 159, 344.

[3] 'Employers' Liability' (containing detailed comment on the law), p. 18. An excellent sketch of the barbaric French and German law will be found in the same work. Barbarous communities universally appear to have recognized the master's liability in a very thorough and cordial fashion.

[4] ibid. 18.

[5] ibid. 24, 28. The Code is much less sweeping.

5. Italy

The Italian Code obediently follows the French (§ 1153): 'Sono obbligati . . . i padroni ed i committenti pei danni cagionati dai loro domestici e commessi nell' esercizio delle incombenze alle quali li hanno destinati.'

6. Switzerland

The Swiss Code of Obligations (§§ 61, 62)[1] is said by Schuster[2] to impose a liability similar to that of the French Civil Code. In its latest form (ed. Rossel) the disposition appears to have been split—the provision relating to minors and imbeciles under the authority of the *chef de famille* of persons living *en ménage commun* being transferred to the Civil Code (§ 333), the fact of who is 'chef' is ascertained by a reference to law, contract, or custom. This is a very sweeping provision—much more so than the French. It is also regrettably vague in its terms. Is a boarder comprised in the *ménage commun*? or a lodger? or a child of eighteen occupying a flat in a university town?

The Code of Obligations retains the provisions regarding employers (§ 55). 'L'employeur est responsable du dommage causé par ses commis, employés de bureau et ouvriers *dans l'accomplissement* de leur travail.' The all-important qualification is made, that he can escape liability by showing that he took every precaution to prevent injury of the kind complained of, or that no care

[1] See for the earlier legislation Pearce Higgins, *ubi sup.*, p. 23.

[2] The learned author erroneously takes the qualification contained in the French article 1384 (Civil Code) as applicable to servants as well as to children and apprentices—viz. that liability can be escaped by proof that the act could not in fact be prevented by the superior ('Principles of German Law', p. 156). See Dalloz, J. G., 'Responsabilité', § 695.

on his part could have prevented it. [The last qualification is new.] The owner of a structure is liable for damage caused by its defects (even to licensees and guests ?) [1]—and apparently this liability is absolute. Injuries done in the course of a corporation's operations do not appear to be dealt with.

7. Portugal

The Portuguese Code puts it differently, but not much better. Its merit is to separate the case of employers from that of parents (with whom it, unlike the French, classes guardians). By § 2380, "'La responsabilité du dommage causé par le domestique ou par la personne chargée d'un service ou d'un emploi, dans l'exercice de cet emploi ou dans l'accomplissement de ce service, incombera à ce domestique ou préposé et à son maître ou commettant, solidairement [sauf recours].' These words are very wide, and go far beyond business employments and mere service ; they might take in almost any case of agency. Probably they are limited by jurisprudence.

By § 2381 : 'when the tort is committed in an inn or any other establishment where guests are received for profit, the master of the establishment is responsible, solidarily with the wrongdoer, if he has received him into the establishment without duly observing the police regulations'.

8. Spain

In Spain (Codigo Civile, § 1903 [2])—'lo son igualmente [responsables] los dueños ó directores de un establecimiento ó empresa respecto de los perjuicios causados por sus dependientes en el servicio de los ramos en que los tuvieran empleados, ó con ocasión de sus funciones.' But

[1] § 58. Cf. Fermoy in *Law Magazine*, May, 1915, p. 282.
[2] July 24, 1889.

fortunately it applies the saving, which the French law provides for parents and teachers, to employers generally. 'La responsabilidad de que trata este artículo cesará cuando las personas en él mencionadas prueben que emplearon toda la diligencia de un buen padre de familia para prevenir el daño.' The Codigo preserves in its entirety the Roman law *de effusis*. 'El cabeza de familia que habita una casa ó parte de ella, es responsable de los daños causados por las cosas que se arrojaren ó cayeren de la misma.' (§ 1910.)

We should also note the obligation placed by § 1908 upon owners of property. They are responsible for the collapse of buildings due to want of repair, for explosions or foul emanations due to want of care, for excessive emission of smoke, and for the fall of trees in 'sitios de tránsito' (except in case of *vis major*). These obligations appear to be absolute, whoever is actually in fault: as there is, in the first case, a right of indemnity against the builder.

The special liability of innkeepers and carriers is recognized by §§ 1782–4, 1601–3.

9. Peru and Guatemala

The Peruvian Code (§ 2191), making a wide generalization, imposes, or did impose, liability on 'en general el que tenga á otros bajo su cuidado' for damage caused by them. This, however, is merely the general statement with which the French § 1384 opens, and which, according to a well-settled jurisprudence, only summarizes the principle without extending the particular cases of its application. In any case, the Peruvian provision is not wide enough to take in the case of servants and employees generally. Perhaps the former existence of slavery accounts for this. § 2195 deals with innkeepers and 2196 with landed proprietors. § 2197 treats *de eiectis et effusis*,

and § 2198 deals with a variety of cases assimilated to negligence, such as driving furiously, firing or setting traps on the highway. The law of Guatemala is similar (§§ 2277–9, Codigo Civil).

10. Russia and the North

The Russian Commercial Code (Tchernow, Paris, 1898, p. 65, § 253) recognizes in the special case of shipowners a liability in case of the shipmaster's insolvency :

'Le propriétaire d'un bateau à vapeur ou d'un autre bâtiment répond du tort et du dommage causés par l'infidélité, la mauvaise foi ou le manque de connaissances techniques du capitaine, ou des dommages dus à son omission et à son inattention, quand le capitaine, auteur du dommage, est insolvable.'

This does not extend to other officers, it seems ; and it is limited to the value of the ship and freight. In Norway (Act of July 20, 1893 : c. 2, § 8), the liability extends also to acts of the seamen, and is not an ancillary liability but a primary one (with a right of recourse). According to Dalloz (op. cit. § 21, p. 298), the laws of Denmark and Norway required some personal default on the part of an employer before liability could be established.

11. The United States

The development of the subject in the nineteenth century took much the same course in the United States as in England. Holt's original doctrine had been adopted in the colonies as part of the general reception of the common law. It is curious to notice that there was much probability that, under the influence of Jefferson, American Courts would have emancipated themselves altogether from the trammels of the *ius civile Anglicanum*, and would have struck out a *ius naturale* which would have been exceedingly interesting and entertaining.[1] There

[1] *Am. Law Review* (St. Louis), Sept.–Oct. 1914, 'The Place of Judge Story in the making of American Law' (Pound).

was a strong body of opinion in favour of breaking loose from English precedents as from English cabinets. Fate and Joseph Story decreed otherwise.

With regard to wilful wrongs and the liability of corporations for their servants, the Courts followed the English decisions with much docility; in fact, in the former respect they may be said to have anticipated them. In one respect only did they strike out an original line—in the theory of a carrier's contract for the good behaviour of his servants towards his passengers. This is a real and valuable contribution to the study of the subject—and it might perhaps with advantage be made the ground of liability in every case. Responsibility would thus be limited to cases where there was at any rate privity.

It may be well rapidly to review the cases.

Chestnut Hill Turnpike v. *Rutter* (Pennsylvania (1818) 4 Serg. and R. 348) is a very early instance of a corporate liability for a tort: which, however, was only case (erection of jetties which resulted in water flooding the plaintiff's land). The brilliant argument of Ingersoll for the appellants is still worth attention. 'Suppose an insurance company should undertake to build a church, could those who were employed recover against the corporation as such? Every principle of the law of corporations forbids it. Now, a corporation never was, and never can be, authorized by law to commit a tort; they can invest no one with power for that purpose.' For non-feasance, they might be accountable, but not beyond. On the other hand, it was urged that 'if a corporation be the intangible being it is asserted to be, a greater and more mischievous monster cannot be imagined'. The Court thought that 'it would be extremely inconvenient that they should do wrong without being brought to justice'—without noticing that it is not 'they' who do wrong at all. 'A turnpike company

might do great injury by means of labourers '—men of straw. But those who instruct them would be liable: so that the argument fails. The judges were much impressed by old cases of municipal corporations: such chartered bodies, however, are not like corporations created to subserve a particular purpose, and enjoy a quasi-personality denied to the latter: *Ashbury Carriage Co.* v. *Riche.*[1]

In 1842 the negligence of its managers was imputed to a corporation in New York,[2] by a very great judge (Nelson C. J.). The authority, however, was derived from cases where there was some special statutory duty on the defendants, which they had failed to discharge.

In 1848 a very singular case was tried in the New York Courts.[3] A Protestant congregation, as owners of a meeting-house, obtained damages for annoyance caused by the noisy Sabbath working of a railway. The congregation, as well as the railway, appears to have been incorporated. Judge Parker held that the argument that a corporation had no power to commit torts was fallacious, and that 'the law had been changed'.

Corporate liability was thus early recognized: but it remained very long unsettled whether and why they (or any one) should be liable for a servant's deliberate acts, as distinct from his negligence. There has been much less tendency than in England to ground such a liability on an implied authority to trespass. Convenience, and a handy dictum of Story's wrested from its context, have usually served instead.

Another early case is *Orr* v. *Bank of the U.S.*,[4] in which it was declared that a corporation could not be liable for assault and battery—even, it is presumed, if expressly

[1] (1874) L. R. 7 H. L. 653.

[2] *Rector of the Church of the Ascension* v. *Buckhart*, 3 Hill, 193.

[3] The *Schenectady* case, 5 Barbour, 79.

[4] (1821) 1 Ohio 36.

authorized by its managers. And in *Foote* v. *Cincinnati* [1] it was held impossible to sue it in trespass *quare clausum fregit*. In this case it seems clear that the trespass had been expressly commanded.[2] In 1837 [3] a municipality was declared liable in tort, though still not for the unauthorized acts of its officers, even if done *colore officii*. There must have been at least a general authority to act for the corporation. In 1839 the same Court was still denying the liability of masters for the trespasses *vi et armis* of their servants, in *Lowell* v. *Boston & Lowell Rail. Corporation*.[4]

The liability of a master for the act of his slave was considered in 1846 in Mississippi, in *Leggett* v. *Simmons*. It was assimilated to that of an employer of a servant.

In *Hall* v. *Conn. River Steam. Co.*,[5] a carrier of passengers was held bound to use the highest degree of care that a reasonable man would use: but of course this falls far short of making him liable for his servant's frauds, assaults, and libels.

In 1838 [6] it was laid down in Pennsylvania that—'Trespass *vi et armis* will not lie against a railroad corporation for an injury . . . whether that injury be wilful or accidental on the part of the servants of the company, where it does not appear that the particular injury was done by the command or with the assent of the defendants'. It was distinctly observed, however, that they might be liable in case if the injury was negligent.

The doctrine was again upheld in 1849,[7] in a case very

[1] (1839) 9 Ohio 31.

[2] In *Brown* v. *Purviance* (Maryland, 1828) 2 Har. and Gill. 316, the act was committed after the employment was concluded.

[3] 36 Mass. 511, *Thayer* v. *Boston*, per Shaw C. J.

[4] 40 Mass. 31.

[5] (1839) 13 Conn. 319.

[6] *P. G. & N. RR. Co.* v. *Wilt.*, 4 Whart. 143.

[7] *Vanderbilt* v. *Richmond Turnpike Co.*, 2 Comstock (2 N. Y.) 479.

like *Limpus* v. *L. G. O. Co.*[1] The *Wave* and the *Samson* were rival steamships, running from New York to Staten Island, and belonging to the plaintiff and to the defendant corporation. The latter vessel, with the head officer of the company on board encouraging the operation, deliberately sank the former. 'I can find no authority', says Cody J., 'making a corporation liable for the wilful trespass of its general or special agent. . . . The general agent was appointed to manage the business of the company in the most advantageous manner for the stockholders, and not to ruin them by his passionate and foolish declarations.[2]

So in Iowa.[3] 'A railroad company is not responsible for the criminal or wilful acts of its agents or servants. It is only answerable for the negligent and careless acts of its agents in the course of the performance of their duty.' This explicit instruction to a jury of Louisa District was refused, but the Supreme Court, 'following what we understand to be a current of unbroken authority', held the refusal improper.

In *Church* v. *Mansfield*,[4] a proprietor's servants, without his knowledge or assent, had made roads across an adjoining proprietor's land in order to cart wood, required for making charcoal for use in the former's furnace. The Court of Errors held that the employer was not liable. Waite J. took the sound distinction that while for the negligent driving of his coachman a master might be liable, yet—'if he were to leave his carriage, and seize the horse of another, whose carriage obstructed his

[1] *Supra*, pp. 90–3, 119, 130–1.

[2] The opinions in these cases, though delivered by one judge, are apparently the opinions of the Court. See *Leggett* v. *Perkins*, 2 Com. 297.

[3] *De Camp* v. *Miss. and Miss. Rail. Co.* (1861) 12 Io. 348. The plaintiff was a stranger.

[4] (1850) 20 Conn. 284.

passage along the highway, and thereby occasioned an injury, his master would not be liable; because, in that matter, he was not acting in the employment of his master'. The reason last given seems odd; but the distinction between negligence and trespass is well maintained.

Again, in *Crocker's* case [1] (Connecticut), a passenger, refusing to pay his fare, was lawfully ejected from a stopped train. The removal was forcible: he struggled and was kicked. For such a kick, though given by its servant in the course of his employment, the corporation could not be responsible: at any rate not in trespass.

Hilliard on Torts (1859) unquestioningly states the old rule of non-liability for trespass. He supports it by *Thames, &c.* v. *Housatonic* (1852) 24 Conn. 40 (watchman unnecessarily cut cable of burning steamer): *Hibberd's* case (1857) 15 N. Y. 455 (railway servants unlawfully or with unnecessary violence [2] expel a passenger); *Vanderbilt* v. *Richmond* (1849) 2 Comstock 479. 'A man', says Hinman J., 'shall not be made a trespasser against his will—though he may be made liable in an action on the case for negligence.' Waite C. J. concurred in this.

In 1858 [3] a case arose in which it was urged that a wilful act of a servant could never be ground for a liability of the master. The act there proved against the servant was one of wilful negligence: not of trespass (detention in a siding all night on a 30-mile journey): and the

[1] (1855) 24 Conn. 248. The dissent of two judges was on no point of principle.

[2] 'This is the extent of their authority [moderate force]: and if they exceed it, they, and not the company, are responsible for the consequences': per Brown J. 'His own mistake as to the extent of his powers cannot make the railroad company liable for acts not in fact authorized': per Comstock J. 'If unlawful, the company had not authorized it': ibid.

[3] *Wood* v. *Panama Rail. Co.*, 17 N. Y. 362.

ground of the suit was purely contractual, so that the attempt was hopeless.

But with the sixties a current of willingness to hold masters, and particularly corporations, liable on general grounds in trespass, exactly as in case, set in. And in the early seventies it swept all before it. The first step was to establish liability in cases of excess in using lawful violence, which, as we have seen, is difficult to distinguish from a case of negligence (though it may be possible to complain of it as a trespass as well [1]).

Grier J. had even laid down in *Philadelphia and Reading RR.* v. *Derby*[2] (in 1852), that 'the doctrine that the master shall be civilly liable for the tortious acts of his servant is of universal application, whether the act be one of omission or commission; whether negligent, fraudulent, or deceitful'. This opinion was lifted bodily from Smith on Master and Servant, and appears to be based on the passage from Story above referred to. Story's proposition was clearly meant to be limited to agents, and agents in contractual relations with the complainant: for he goes on to say 'in no other way could there be any safety to third persons in their dealings, either directly with the principals, or indirectly with them through the instrumentality of agents. In every such case, the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters of the agency.' This may well be, when privity between the parties is in question: but it has no application to a case of tort. And although Story elsewhere says casually, in commenting on Blackstone, that 'the master is liable for the wrong and negligence of his servant', that is plainly referable to the case on which he is commenting—viz. negligence.

Mr. Justice Story has been unfortunate—perhaps

[1] On the doctrine of trespass *ab initio*.

[2] 14 How. 468.

through his very eminence—in having his dicta turned into propositions by which he would have been considerably surprised.[1] It is difficult to resist the conclusion that in this leading case of *Derby*, we have another instance of pure mistake on the part of the judicial bench.

Some years later the doctrine was recognized in S. Carolina.[2] It is a curious case: a caretaker ejected a lady from a waiting-room on the allegation that she was a negro.

As early as 1855, indeed, it was admitted by counsel in a Massachusetts case that a railway company were liable if their conductor put a passenger off the car in the mistaken impression that he had not paid his fare—a mere trespass.[3] *Orr* was cited, but only as having been overruled by *Broom*, *Riddle*, and *Thayer's* cases. (But *Riddle* was decided before *Orr*, and was distinguished in it, as grounded in case.) This case, however, remains an isolated one for some years, and may be explained as resting on contract.

In 1862 *Hewett* v. *Swift*[4] was decided in Massachusetts. A boy was lawfully removed from a freight dépôt, but with excessive violence. The principle of *Moore* v. *Fitchburg* (where no excessive violence was used, but no due occasion for the exercise of the power had arisen) was applied to the case. (Cf. *Howe* v. *Newmarch* (1866) 94 Mass. 49, 57: there had been a dispute as to the servant's driving on the sidewalk. The plaintiff insisted on walking in front of his cart, and the servant deliberately drove against him. The judge (Vose) directed the jury in the sense of *McManus* v. *Crickett*,[5] but the Court ordered a new trial.)

[1] Cf. the *Commercen* (1816) 1 Wheat. 382, and the present writer's 'Britain and Sea Law', p. 50 (1871).

[2] *Redding* v. *S. C. Rail. Co.* (3 S. C. 1: 16 Am. Rep. 681).

[3] *Moore* v. *Fitchburg*, 4 Gray, 465.

[4] 85 Mass. 420.

[5] p. 82, *supra*.

In 1861 *Sanford's* case [1] was decided in New York State. A conductor threw a passenger, whom he was entitled to eject, off a street-car, and the latter was killed. The only argument addressed to the Court on behalf of the employers was that they were not liable for excess of violence. The Court seems to have thought that the whole act of ejection was a mere trespass, and they treated it as indisputable that an action against the employers lay.

In 1862 [2] the same view was taken in Pennsylvania. In either case, however, the excess of violence might have been equiparated to negligence, with the ordinary result of liability on the part of the masters.

Apart, therefore, from *Philadelphia &c.* v. *Derby* and *Moore* v. *Fitchburg*, there was little authority for extending liability to wilful trespasses. Indeed, there was considerable authority against it.

Mali v. *Lord* (1868) 39 N. Y. 381 was a case of arrest on suspicion of theft, by a shopman. It was held that the master of the latter was not liable : on the ground that he could not implicitly authorize illegality.[3]

In 1864 a baggage-checker at Columbus, during an altercation on business with a passenger, struck at and wounded him, in alleged self-defence. The company were exonerated,[4] though the jury found that the man was acting in the scope of his employment.

On the other hand, in the same year, a street-car conductor threw two passengers off the vehicle because they would not sit where he arbitrarily directed them : and the company had to pay.[5] It is next to impossible to

[1] 23 N. Y. 343.

[2] *Penn. RR. Co.* v. *Vandiver*, 42 Penn. St. R. 365.

[3] In *Cosgrove* v. *Ogden* (1872) 49 N. Y. 255, it was unsuccessfully attempted to push this dictum into the region of liability for negligence.

[4] *Little Miami Rail. Co.* v. *Wetmore* (1869) 19 O. St. R. 110.

[5] *Pass. Rail. Co.* v. *Young* (1871) 21 ibid. 518. Virginia has invested conductors with such powers : see C. F. Libby, *Rep.* 1910, Am. Bar Assoc.

reconcile these two pronouncements of White J. In a case tried in 1875 [1] it was added that excessive force, or negligence, occurring in connexion with the ejection of a trespasser or licensee from a car, would render the company liable. This, of course, is in accord with principle. The act is not trespass, but negligence in the performance of a lawful act in the course of employment.

But the tide was turning. Grier's Supreme Court decision was forcing its way into the State Courts. The American genius for legal principle was nevertheless not satisfied with its grounds. It could not be persuaded by an equity judge like Story that it was right to impute the *mens rea* of trespass to an innocent employer. Wherever possible, it founded the responsibility on a new interpretation of the contract of carriage.

In *Goddard* v. *Grand Trunk Ry.* (1869) the liability of corporations for the wilful acts of servants in the course of their duty is expressly rested upon contract—the terms of the contract of carriage : which are ' to carry the passenger safely and properly and to treat him [2] respectfully '. Angell and Ames on Corporations make the same distinction.[3] As the head-note in *Pendleton* v. *Kinsley* (1871) 3 Clifford 416 observes : The principles of law applicable to the relation of master and servant do not fully define the rights, duties and obligations between carriers of passengers, and passengers ; they are not merely citizens bearing only towards each other the relations which one citizen bears to another : the carrier had agreed to carry for hire the passenger from one place to another, and was responsible for any breach of the

[1] *Healey* v. *City Pass. Rail. Co.* (28 O. St. R. 23).

[2] It is sometimes denied by travellers that the law is observed in this particular.

[3] Cf. *Brand's* case (1850) 8 Barbour, 368 ; *Moore's* case (1855) 4 Gray, 465 ; *Finney's* case (1860) 10 Wis. 388 ; *Vandiver's* case (1862) 42 Penn. St. R. 365 ; *Weed's* case (1858) 17 N. Y. 362.

obligation he had assumed, that the passenger should not be ill-used by himself or his servants.

The suggestion was also received with favour in *Chicago &c. Rail. Co.* v. *Flexman*,[1] 'where a railway servant, accused by a passenger of theft, struck him in the mouth with a hand-lamp. The company were held liable by Craig C. J. And in *Sherley* v. *Billings* (1871) 8 Bush (Ky.) 147, where a ticket-clerk on a steamer charged a passenger with having hidden under the boilers, and proceeded to strike his eye out, the same principle was approved: 'all intercourse between the officers and passengers naturally and legitimately growing out of the relationship existing between them may properly be said to come within the scope of their employment'.

This principle of the contractual liability of common carriers to ensure the safety of their passengers from ill-treatment by their servants seems a very lawyer-like and proper ground on which to place the liability of railways for porters, conductors, and the like. It was taken up in *Stewart* v. *Brooklyn &c. Co.*[2] in 1882. Stewart and the other passengers in a car had offended the conductor by interfering on behalf of a newsboy who had boarded the conveyance. The conductor assaulted Stewart. For this wilful trespass, utterly outside the course of his employment, the company were held responsible.

'By the contract, the company had undertaken to carry the plaintiff safely and to treat him respectfully. A carrier . . . does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger.'

We have seen this doctrine contradicted, in the old case of *Hibberd* (*supra*, p. 186) and, reasonable as it may be,

[1] (1882) 103 Ill. 546.

[2] 90 N. Y. 588.

it is certainly novel. In cases where it can be adopted, of course the distinction between negligence and trespass is irrelevant. For the gist of the action is contract.

However, in *Isaacs* v. *Third Avenue Rail. Co.* (1871) 7 Am. Rep. 418 (New York), Allen J., decided that a conductor who threw a passenger off a car because she would not alight until it had stopped, was properly held to be acting outside the scope of his employment; though a conductor who, mistaking his powers, unlawfully but otherwise properly, ejected a passenger, was held to be acting within them (ib. 293, *Higgins* v. *Watervliet*). The expressions of the judges in *Hibberd* v. *N. Y. & Erie RR. Co.* were declared to be probably 'not in harmony with the later cases', and unsound, although 'supported by the earlier cases, and by the elementary authorities'.

The doctrine does not, of course, protect strangers. It was held in *Pass. Rail. Co.* v. *Donahue* (1871) 70 Penn. 120, that a conductor who knocked a boy off a car with an iron lever was not acting within the scope of his employment.

So, in the absence of contract, we find the old doctrine coming up again very clearly in 1879 in Pennsylvania.[1] The 'carrier' doctrine was not urged or alluded to. A conductor put a stowaway off the moving cars. 'If he was acting within the scope of his employment, the company is liable for that act of the conductor, though he may have done it in a careless, negligent, or reckless manner; but for his unauthorized, wilful and wanton or malicious trespass, the company is not liable': per Mercur J. and five others, citing *P. G. & N. Rail. Co.* v. *Wilt*,[2] and *Pass. Rail. Co.* v. *Donahue*.[3] And they held that there was sufficient evidence of malice to be left to a jury. Presumably malice is used in the sense of express malice:

[1] *Penn. Co.* v. *Toomey*, 91 Penn. 256.

[2] (1838) 4 Whart. 143.

[3] 20 P. F. Smith, 119.

otherwise the judgment is an admirable statement of the law. It is a curious state of affairs, in which the less badly treated a complainant has been, the better are his prospects of getting damages !

But the Courts are inclined to follow the doctrine of Grier (imputed to Story), according to which it is, as we have seen, unnecessary to invoke a contract to carry respectfully and without assault.

In 1876, *Rounds* v. *D. L. & W. Rail. Co.* (64 N. Y. 129), determined that, even for wilful and illegal acts, the test of liability was whether they were really done for the service of the employer or to effect the servant's own objects : i. e. simply whether they were done in the course of the employment or not. The old doctrine was thus completely departed from. This was recognized in *Mott* v. *Consumers' Ice Co.* (1878) 73 N. Y. 543, and frequently since. In Illinois, it seems to have long been the law.

In 1849, in Illinois, we have a decision that wilful lighting of fire by a servant would involve the master, unless it was done for the servant's own ends.[1] The actual case, however, was one of statutory authority to raise fires, which must be exercised carefully. The gist was negligence. In 1868, the wilful frightening of a team by an engine whistle was held, however, to be an act of the engine-driver for which the company were liable.[2] 'It can make no difference in its results to appellee, whether the escape of steam was the result of negligence or from wanton and wilful purpose.' Companies should not be permitted to say 'He was engaged in carrying on our business, and while so engaged, he wilfully perverted the instruments which we placed in his hands to something more than we designed or authorized, and therefore we should not be liable for the injury thus inflicted '. This

[1] *Johnson* v. *Barber* (1848) 10 Ill. 425.

[2] *Toledo &c. Rail. Co.* v. *Harmon*, 47 Ill. 298.

seems clearly mistaken law. *Chicago &c. Rail. Co.* v. *Flexman*[1] is a clear case of independent action on the part of a servant, altogether outside his duties.

It was in 1858 that the Supreme Court of the United States held that corporations could be sued in libel.[2] Mr. Justice Daniel's powerful dissenting judgment is well worth study. 'In the present instance, this may subserve the convenience of the individual; but in another aspect, the mischiefs incident to such a relaxation would be real and serious. . . . This theory involves the confounding of all political, moral, legal and social distinctions. No *quo animo* can be affirmed of a fiction in which no *animus*, or passion, or moral quality, can be imparted.'

The attempt has been made to extend the doctrine to charitable corporations. As all their property is held on trust, it is difficult to see how it can be made available in execution, any more than trust funds in the hands of any other trustees. The Supreme Court of Connecticut rejected the proposition, in *Hearns* v. *Waterbury Hospital*.[3] Fundamentally, this is inconsistent with the doctrine of the *Mersey Docks Trustees*[4] case, but it may well be thought better law. *Donaldson* v. *Gen. Pub. Hosp. of S. John*[5] was cited as authority for the corporate liability in such a case, and *McDonald* v. *Massachusetts Gen. Hosp.*[6] as decisive against it, and as approved in Pennsylvania, Maryland, Virginia, California, Indiana, Iowa, Kansas, and New York. The judgment of Hamersley J. contains a most valuable account of the authorities. He explains the *Mersey Docks* case as turning on the fact

[1] (1882) 103 Ill. 546, *supra*, p. 191.

[2] *P. W. & B. Rail.* v. *Quigley*, 21 How. 202.

[3] (1895) 66 Comm. 98.

[4] *Supra*, pp. 74, 76, 77.

[5] 30 N. B. 279.

[6] (1876) 120 Mass. 432. Cf. *Heriot's Hospital* v. *Ross* (1846) 12 Cl. & F. 507.

that the business of the Board was of the same nature as might be carried on by private persons for profit. His Honour suggests that in such cases it is to be supposed that the Legislature meant the work to be carried on under similar conditions. The argument is too subtle. One cannot think it otherwise than very dangerous to speculate on the intentions of the Legislature where it has not thought fit to express them.[1] A similar argument seems, however, to have prevailed with the English Courts to induce them to hold the corporations of Manchester[2] and Sunderland,[3] as early as 1857 and 1861, liable for the negligence of their servants in laying gas-pipes, and for the improper and dangerous condition of their public washing-machine for the use of which a charge was made. The gas-works were apparently considered to confer a benefit on the people of the district analogous to the profits of a private gas-works proprietor. It seems a fanciful principle, and one of which it is not easy to ascertain the limits.

In Massachusetts, the non-liability of municipal corporations when acting in the execution of powers imposed on them independently of their assent, appears to be an established doctrine : see *Hill* v. *Boston* (122 Mass. 344), *Tindly* v. *Salem* (137 ibid. 171) and cf. *Donnelly* v. *Boston Cath. Cemetery Assoc.* (146 ibid. 163); whilst we have seen that charitable corporations were exempted in *McDonald's* case. In Rhode Island, on the other hand, a charitable corporation was held liable for the negligence of a surgeon,

[1] Cf. *Levingston* v. *Lurgan* (1868) 2 I. R., C. L. 202; *Lyles* v. *Southend* (1905) 21 T. L. R. 389.

[2] *Scott* v. *Manchester*, 2 H. & N. 204.

[3] *Cowley* v. *Sunderland*, 6 ibid. 565. Of course, municipal corporations had long been liable for non-feasance: *Henley* v. *Lyme Regis* (5 Bi. 91); *Lynn* v. *Turner*, Cowp. 86. And in 1844 Lord Langdale had held a municipality liable for its mayor's breach of trust (*A.-G.* v. *Leicester*, 7 Beav. 176).

in *Glavin* v. *R. I. Hosp.* (12 R. I. 411). But in Pennsylvania, it has been held that the funds of a public charity cannot be taken to compensate for injuries caused by the negligence of agents—'It would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length. That doctrine is at best a hard rule.'[1] So Kentucky,[2] Michigan,[3] and the Federal Circuit Court of Appeals in *Union Pacific RR. Co.* v. *Artist*.[4] Indeed, in the latter case, the proposition was sustained that an employer is in no case answerable for the conduct of the servants employed by him in the management of a charity hospital.

In *Jones* v. *New Haven* (1867) 34 Conn. 1, the Court held the city liable for the negligence of its servants in carrying out its by-laws. The liability of municipalities appears to rest in England on the postulate that corporations by charter are not subject to the limitations which attend statutory companies; and accordingly that the doctrine of *ultra vires* does not apply to them in its full extent. In America, this distinction does not appear to have been adopted, and the liability of municipalities is strictly circumscribed. In the above case, the Connecticut Court limits it to instances in which the duty in respect of which the liability is alleged to arise has been cast upon the municipality by its own express consent. Whether this distinction or that of the Massachusetts Court is the more correct one, it is difficult to say. Massachusetts makes the exercise of governmental functions (as opposed to the carrying on of works as a private individual might do) the test of immunity. Connecticut makes it the exercise of functions cast upon

[1] *Fire Insce. Patrol* v. *Boyd* (1888) 120 Penn. St. R. 624.

[2] *Williamson* v. *Louisville Indust. Sch.*, 23 L. R. A. 200.

[3] *Downs* v. *Harper*, 25 L. R. A. 602; 101 Mich. 555; 45 Am. St. Rep. 427.

[4] 60 Fed. Rep. 365.

the municipality without its assent, by the mere operation of law. Perhaps neither test is satisfactory. Each is very difficult to apply. The great power wielded by such organizations may induce us to prefer the principle of their responsibility in all cases. It is not merely that the municipality is powerful ; but it is likewise ineluctable. It confronts the private person at every turn ; and it is sustained by an impenetrable *esprit de corps*.

CHAPTER X

VICARIOUS CRIMINAL LIABILITY

The admission of a possibility of vicarious criminal liability is most early and most marked in the case of libel. Lord Mansfield and Justices Aston, Willes, and Ashhurst (*R.* v. *Almon*, 5 Burr. 2686) were inclined, in 1770, to admit a bookseller to excuse himself by affirmative proof of want of knowledge, if his shopman sells a libellous paper. They therefore regarded his contingent liability not as a vicarious liability, but as grounded in a presumption of evidence—open to be rebutted like other presumptions. If a book belonging to *Z* is found in *A*'s pocket, it is strong evidence that *A* stole it. If a book 'printed for *A*' is in *A*'s shop for sale, it is strong evidence that *A* knows about it and means it to be sold. The judges obviously did not consider it irrebuttable evidence. Thirty years later, however, Lord Kenyon laid it down in terms (at nisi prius) [1] that the proprietor of a paper was answerable criminally, as well as civilly, for the acts of his servants or agents, for misconduct in the conducting of the paper. Espinasse is not a good reporter; and the dictum is in any case far too widely framed, for no one asserts that a newspaper proprietor is criminally liable for the assaults and trespasses committed by his staff. But the case is cited as the main authority for the general doctrine of liability in such cases of libel, which was laid down by Lord Tenterden (again at nisi prius) in 1829.[2]

[1] *R.* v. *Walter* (1799) 2 Esp. 21.

[2] *R.* v. *Gutch*, Moo. & Mal. 483. (In fact, the defendant was ultimately released on his own recognizances.) The attribution of the case to the year 1808 in *R.* v. *Holbrook*, *infra*, is a clerical error.

The difficulty of relying on nisi prius cases is shown by the fact that on the next day, Tenterden admitted that there might be cases in which the proprietor might be exempt, but 'generally speaking, he is answerable'. This seems a vague and dangerous ground on which to found a sentence of infamy. In fact the doctrine had been growing, obscurely, throughout the eighteenth century. It had taken the shape of a presumption of evidence by 1770; and by 1829, and perhaps 1800, it is probably true to say that it had become a presumption almost irrebuttable in the case of newspaper proprietors. With regard to others, the law was still indulgent. A tradesman's daughter, employed to write business letters, wrote a libellous letter in reply to a complaint of an overcharge. It was held that this was insufficient evidence of libel as against the parent.[1] But in 1834, the strict exclusion of exculpatory evidence was applied in a newspaper case in *R.* v. *Colburn* :[2] when the defendant proprietor was not even allowed to recover an indemnity against his peccant editor. Such liability was truly vicarious, and the mistake of Kenyon and Tenterden was corrected by 6 & 7 Vict. c. 96. The whole subject was reviewed in *R.* v. *Holbrook*,[3] in 1878, when the true effect of 6 & 7 Vict. c. 96 was considered, and it was held that when it requires complicity or at least negligence to be proved, it does not mean that negligence or worse can be inferred as before from the mere fact of investing an editor with a general discretion. 'A person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful and not in an unlawful manner.'[4]

Apart from libel, one of the first cases of apparent vicarious criminal liability is *R.* v. *Dixon* (1814) 3 M. & S. 11.

[1] *Harding* v. *Greening* (1817) 8 Taunt. 42.
[2] See *Colburn* v. *Patmore*, 3 C. M. & R. 74. [3] 4 Q. B. D. 42.
[4] ibid. *per* Lush J. See also judgment of Cockburn C. J.

The contractor for the supply of bread to the Royal Military Asylum supplied bread which turned out to contain lumps of alum. He was indicted for the supply of noxious matter, and the indictment was upheld, but in no very clear terms. The judges appear to have considered that the very fact of the alum being in the loaves was evidence of negligence. Ellenborough observed that alum 'required great care in those who ventured to use it'. 'He who deals in a perilous article . . . if he observe not proper caution, will be responsible.' Bayley J. said that if he employed a servant to use an ingredient, the unrestrained use of which was noxious, 'and did not restrain him in the use of it', he would be answerable, 'because he did not apply the proper precautions against misuse'. But what are these? Apparently, the conviction was placed on the ground that to use alum at all in bread was a thing so likely to lead to disaster as to be criminally imputable if disaster occurred. It is like riding into the thick of a crowd. The case is therefore not really one of vicarious criminal liability. It was his own fault for which the employer was held responsible. He had taken upon himself to use alum in his bread.

The case which furnishes the leading authority for the developments which, as we shall see, took place in the nineteenth century, is *R.* v. *Marsh*.[1] Twenty-two partridges and twenty-two pheasants of the game of England were found in a carrier's cart on the way from Norwich to London. He denied all knowledge of them, and it is probable that they were put in by the driver. But he was convicted of having game unlawfully in his possession as a carrier.[2]

Lord Tenterden said that if knowledge had to be proved, it would cast on the prosecution an onus 'which could

[1] (1824) 2 B. & C. 717.

[2] (5 Anne c. 14, s. 2). Fine, £5 per head.

not be easily satisfied'. But it did not follow that want of knowledge might not be proved by the defendant: Bayley treated the fact of constructive possession as prima facie evidence, but, as such, rebuttable. 'Then we should consider how it might have been rebutted. . . . The way-bill made out at Norwich ought to have been produced, to show that it was not put in with the assent of the master; or some evidence should have been given to show that the game was put into the wagon contrary to the order of the defendant and for the benefit of his servant. No such evidence was given.' Littledale invoked the analogy of the law of libel, and doubted whether want of knowledge would be a defence. However, he observed that the finding of the game in his wagon raised a presumption of knowledge, and that presumption had not been rebutted. The words *mens rea* were not mentioned in the whole case, and it is submitted that it is not a particularly satisfactory one. The judgments are vacillating, and some of the dicta would go to establish criminal liability in all cases where the word 'knowingly' was not expressly inserted in the statute. Tenterden's would certainly impose on all masters criminal responsibility for all the homicides and burglaries committed by servants in the course of their employment. His Lordship's attitude is permeated by precisely the same vice as, later, characterized Lord Blackburn's.

The only other cause which can be coupled with *R.* v. *Marsh* as an early authority is *R.* v. *Siddon*.[1] This was an information for using an inapplicable permit to cover smuggled tobacco. The defendant was from home, and had been for some time, when the tobacco was found on his premises. A servant attempted to cover it with an inapplicable permit. Alexander L. C. B. ruled that the servant's knowledge was enough, if it was in the course of

[1] (1830) 1 Cr. & J. 220.

the business, and directed a verdict for the Crown. On a rule to enter it for the defendant it was argued that an information [under a Revenue Act] for penalties was not strictly a criminal proceeding, but was in the nature of a civil remedy to recover a debt due to the Crown; and counsel relied on *R.* v. *Gutch* for the broad proposition of Lord Tenterden, that 'a person who derives profit from, and furnishes the means for carrying on, the concern, and entrusts the conduct of it to one whom he selects and in whom he confides, is answerable [*scil.* criminally] for the acts of that agent'—an absurd proposition. They added the more practical consideration that 'if absence were an excuse, no penalty could ever be enforced'.

Alexander abode by his judgment, concurring with Bayley, Garrow, and Vaughan. He saw the dangers of the doctrine: 'How far this rule [that the master authorized his servant's wrongful act] may extend in criminal proceedings, I will not . . . presume to say.' The true ground of the judgment, as he proceeded to explain, was expediency. Bayley B. thought the whole matter a civil proceeding.[1] But even if it were criminal, it was a case of the servant of a fraudulent master,[2] endeavouring, by his own act, to conceal his master's fraud. That, he thought, was prima facie evidence of authority to use the improper permit. But 'the master was certainly at liberty to have produced evidence to rebut that prima facie case'. Garrow agreed as to the prima facie character of the evidence. 'The admission', said Vaughan, 'that the defendant was properly convicted on the second count [harbouring] creates a presumption that the servant was authorized by the

[1] The case of *R.* v. *Huggins* (4 Geo. II) 2 Ld. Raym. 1580, was strongly relied on as showing that criminal liability can only arise out of the accused's own acts.

[2] 'The master, having full knowledge that the things were there (for we are bound to consider that as an ingredient in the case) . . .' (p. 228).

master to do the act upon which the conviction on the seventh count proceeded . . . It was prima facie evidence, liable to be repelled by other evidence.'

The servant's acts are, therefore, no more than strong evidence of the master's complicity.[1] It is therefore scarcely right to include these game and revenue (and perhaps libel) cases, as Wright does (*infra*, p. 216), among cases where the master is liable for the servant's act without being admitted to excuse himself.

For cases of this absolute liability we have to wait half a century. In 1834, indeed, the directors of the Equitable Gas Company were held liable at nisi prius for river pollution by their superintendent and engineer. But this was a case of nuisance, which is rested on totally different principles, the complaint being civil in its nature, and the remedy anomalously criminal. The efflux 'smelt ready to knock anybody down': a sample of it was produced in court, 'and fully justified the witnesses' statement'.[2]

A more recent case of this kind is *R.* v. *Stephens* (1866) L. R. 1 Q. B. 702. It was decided generally that the common law indictment for public nuisance lay against the master of the servant who committed it in the course of his employment. Such an action, though in form criminal, is really civil, and has not a few of the incidents of a civil trial, including a liability to costs. But even in such cases the liability is not very clearly justifiable. The defendant had a slate quarry in Wales, which was managed by his sons. The workmen put rubbish in a place which had been expressly forbidden; it fell into the Tivy and obstructed navigation. On the

[1] This effect of a servant's acts, viz. to shift the burden of proof, is regarded as the proper theoretical mode of procedure in all cases by Wäntig (cit. Higgins, 'Employers' Liability', p. 30). So Willems, in France (ibid. p. 60).

[2] *R.* v. *Medley*, 6 C. & P. 292.

authority of Denman's ruling at nisi prius in *R.* v. *Medley* (1834) 6 C. & P. 292, this was held to involve criminal liability on the defendant; and liability, in theory, not to a small money fine, but to imprisonment in the common jail. Mellor and Shee upheld Blackburn on the unsatisfactory ground that in the particular case before them, the proceeding was 'in substance in the nature of a civil proceeding'. But all public nuisances are not so innocuous: who is to decide whether their prosecution is 'substantially civil', or tinged with criminology? Lush J. in *Holbrooke* (*supra*, p. 199) perhaps indicates the correct distinction. The master is indictable when indictment is the only remedy:[1] as it is when there is no proof of special damage. *R.* v. *Medley* and *R.* v. *Stephens* are therefore merely examples of a very special class of cases, in which a civil liability is enforced by the forms of criminal law. They stand outside the main current of development.

Marsh slept unnoticed for nearly forty years, and *Siddon* for over thirty. Even for their limited proposition that the onus of proof shifts to the master when his servant is found doing something wrong in the course of the business, they appear to have been seldom invoked.

There is a small group of cases decided about the middle of the century which show that the old idea that criminal liability must depend upon personal knowledge of the facts which make the act unlawful had not been seriously, or at all, disturbed.

The well-known case of *Hearne* v. *Garton*[2] was one of a transmission by rail of certain acids in justifiable ignorance of their nature. This was held to be no infringement of the railway's Act (5 & 6 Will. IV, c. cvii, § 168), for there was no *mens rea*. Campbell C. J. said that the

[1] *R.* v. *Holbrook, ut supra*, explaining *R.* v. *Stephens*.

[2] (1850) 28 L. J. M. C. 216; 2 E. & E. 66; 95 Ky. 251; 44 Am. St. Rep. 243.

justices were perfectly right in refusing to convict. 'What they have done is very satisfactory to me. . . . It was an improper thing to initiate these criminal proceedings.' 'Actus non facit reum nisi mens rea.' This of course is not the case of a servant's act, but it is impossible to discuss the question of a master's liability without touching on other cases of the absence of *mens rea*. Of course *mens rea* may fail to exist for many other reasons than the fact that the matter is performed by a servant. Cf. *Derbyshire* v. *Houliston* (1897) 1 Q. B. 772.

In 1864 it was held by Cockburn and the Queen's Bench on a Collieries Act (5 & 6 Vict. c. 99) that the person who worked a mine was not responsible as 'allowing' certain individuals to work particular machinery unless he knew or must have known of it.[1] No authority was cited, or at any rate reported. Blackburn was a party to the decision, and it is interesting to note that already he was forward to observe 'A little more would have done' to establish complicity.

But in 1862 we already see the first glimmerings of a change. When a publican was accused of allowing misconduct of which he did not know, Blackburn at once inquired: 'If the wife was left by him in charge, is he not responsible for her conduct?' Blackburn's mentality, like Tenterden's, was saturated with the contractual conception of agency, with which, as a great commercial judge, he was familiar. It is hard to avoid the opinion that he carried the *Qui facit* maxim far beyond its proper sphere.

In the same year, 1862, a servant fixed his master's steam threshing machine (let out on hire) within the prohibited twenty-five yards from a highway.[2] It was urged by F. Stephen that the master should have told his servant

[1] *R.* v. *Handley*, 9 L. T., N. S. 827.

[2] *Harrison* v. *Leaper*, 26 J. P. 373 (5 & 6 Will. IV, c. 50, s. 20).

not to infringe this prohibition.[1] He did not put the case higher than that, nor argue that the master was liable on account of the public danger, if the servant should disregard his instructions. But, even so, he failed to convince the Court. 'The servant is as much bound to know the law as his master', said Cockburn C. J., and the Court decided 'There is no *mens rea*, for the master is stated by the case to have known nothing about it'.

Yet what is more important for the public safety than that the public roads should be safe? Is it more important that gambling should not go on in public-houses?

The latter atrocity came before the Queen's Bench in the next July.[2] The information was for knowingly suffering gaming in a beerhouse. The beerhouse-keeper was ill in bed. His wife told the police, when they observed there was gaming going on, 'They are very quiet: I hope you will take no notice of it, for the sake of my family.' The magistrates convicted, and the Queen's Bench quashed their determination, but only on the ground that the 'frolic with the bullets' was a mere casual act, and that the wife, if in charge, was not shown to be cognizant of it. Nor, it is presumed, was she 'wilfully' ignorant of it. 'The whole thing', says Wightman, 'might take place suddenly in a few minutes. Is the beerhouse-keeper to be liable for this?' 'We do not want it to be taken for granted', observed, however, Crompton, with whom Blackburn obviously heartily concurred, 'that if a beer-house-keeper leaves some one in charge of his house, and gaming is carried on, he can escape by saying that he himself knew nothing about it.'

The cattle plague gave occasion for drastic Orders in Council in 1866. One of these required an inspector's

[1] Cf. *Commrs. of Police* v. *Cartman* and *Coppen* v. *Moore*, *infra*, where it has been held that express and specific prohibition will not do!

[2] *Avards* v. *Dance* (1862) 26 J. P. 437.

directions for disinfection to be complied with by the occupier of a farm. In a case[1] which came before the Queen's Bench, Cockburn C. J. and Shee J. said that if the order had not been brought home to the employer, he could not be convicted for the default of his foreman in this respect. Mellor, however, could not agree as to the necessity for *mens rea*: this was 'simply a penalty[2] for breach of a sanitary regulation'.

But we see the established dislike of convicting an innocent party visibly tottering in 1868, in *Willcock* v. *Sands*.[3] This was exactly similar to *Barnes* v. *Akroyd*, *infra*. Mellor and Lush both held that the employer was not liable for the foreman's negligence in permitting smoke from their works. Blackburn held strongly the contrary. Cockburn 'agreed on the whole' with the majority. 'If he had been personally negligent, it could be otherwise. But where the master does all he can be expected to do, he ought not to be liable for this constructive negligence through his servant.'

It was easy to see what would happen when Blackburn obtained an ascendancy. A flood of new doctrine was spread over the land in the early seventies.

In *Fitzpatrick* v. *Kelly* (1873) L. R. 8 Q. B. 337, a sale by a shopman of butter containing a mixture (which seems to have been most repugnant to the taste of Quain J.) consisting of tallow and lard, was held to be a sale for which his employer was liable, within sect. 2 of 35 & 36 Vict. c. 74. The case which seems to have led up to the passage of the Act was *Core* v. *James* (1871) ibid. 7 Q. B. 135, where the old Act of 6 & 7 Will. IV, c. 37[4] was held to apply only to admixture with knowledge.

[1] *Searle* v. *Reynolds*, 14 L. T. 518 (11 & 12 Vict. c. 107).
[2] Maximum, £20.
[3] 32 J. P. 292 (Leeds Improvement Act, 1866, § 70 A).
[4] Penalty £5 to £20 fine, plus advertisement.

According to sect. 13 of the latter Act, the master baker is allowed an indemnity against the servant and therefore may be supposed to be liable for the act of the latter,—but it must be his intentional act. The statute does not use very plain language, and in *Core* v. *James* it may be that Lush and Hannen were mistaken in thinking that the master could be convicted for the servant's acts of admixture. There are other sections, such as that of goods being on the master's premises for sale, to which sect. 13 could more naturally apply. Under the newer Act of 1872, it was argued in *Fitzpatrick* v. *Kelly* that sect. 3 defined and limited (by requiring knowledge) what was 'adulteration' within sect. 2. Blackburn, fresh from his Edinburgh honour of LL.D., held that it instituted an independent offence, and that sect. 2, unaffected by the limitations of sect. 3, made it an offence to sell adulterated goods, whether knowingly or not.[1] Consequently, the shopkeeper was held liable for selling what his assistant sold without due warning to the purchaser.

Barnes v. *Akroyd* (1872, ibid. 474) was a black smoke case. The occupiers of a mill were held responsible for 'allowing' a nuisance,[2] simply because smoke in volume was in fact emitted during seventeen minutes of one hour. Blackburn again played on the string *Qui facit.* 'If the person who actually caused the smoke to be sent forth was the servant of the respondents, then the latter were

[1] This construction was wrong. The section (3) was meant to afford a restrictive definition, and not to provide for anything so absurd as the 'addition of air' (which might, Blackburn suggested, not come within sect. 2). This is made clear by the Act which was passed in 1875, the well-known present statutory authority on the subject. A comparison of the two shows that sect. 3 did mean to limit sect. 2, and to limit 'adulteration' to the addition of matter with a fraudulent design, and not to include the addition of matter for commercial purposes. 38 & 39 Vict. c. 63, s. 6, carefully exempts the latter additions.

[2] 18 & 19 Vict. c. 121, ss. 12, 44; 23 & 24 Vict. c. 77, s. 13; 29 & 30 Vict. c. 90, ss. 14, 19.

the persons who created the nuisance and are responsible for so doing.' Mellor concurred. This is of course flatly contradictory to *Willcock* v. *Sands*, *R.* v. *Handley* (to which Blackburn and Mellor were parties), and *Core* v. *James*. So that Blackburn (with Mellor's silent and vacillating concurrence) is in contradiction with Lush, Hannen, Cockburn, and Crompton. The decisions cannot be reconciled by saying that all recognized that repeated acts of the servant are evidence of knowledge in the master. For a colliery owner might very well find a careless stoker in charge for an hour. Besides, Blackburn puts the decision squarely on his favourite aphorism of *Qui facit*.

The Common Pleas, however, remained true to principle.

In 1873 (L. R. 8 C. P. 323, *Nichols* v. *Hall*) it was decided that a statutory Order in Council requiring notice to be given of foot-and-mouth disease by persons having cattle in their possession or charge is not infringed unless the defendant knows of the disease. It was argued ineffectually that if this construction were correct, the provision would become practically useless. A farmer need only keep out of the way. Honyman J. reserved his opinion as to whether the master might ' perhaps ' be convicted for the guilty act of his bailiff. Only, here, *no one* was shown to have known of the condition of the animals.

In the same year, a penalty imposed on ' the owner or agent ' of a mine if ' through the default of the owner or agent ' certain rules were broken,[1] was held not to attach to the owner if the default was that of a lampman.[2] The prosecution, said Lord Esher (then Brett J.), must

[1] 23 & 24 Vict. c. 151, ss. 10, 22.

[2] *Dickenson* v. *Fletcher* (L. R. 9 C. P. 1). The head-note is a little misleading, implying that the owner presumably entrusted the duty to the lampman. The penalty was a £20 fine.

fail—'if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty'. Personal neglect or default must be proved, in the absence of clear words dispensing from that necessity.

But the Queen's Bench, being the appellate Court from magistrates, had a great advantage.

Mullins v. *Collins* (1874) L. R. 9 Q. B. 292 was the case, constantly referred to, in which a licensed victualler was convicted for the supply of liquor by his servant to a constable on duty.[1] Blackburn said: 'If we hold that there must be a personal knowledge in the licensed person, we should make the enactment of no effect.' Quain said: 'We should render the enactment wholly inoperative.' Archibald was the only member of the bench who gave anything resembling a reason: he pointed out that the word 'knowingly', though used in the first sub-section (dealing with harbouring), is omitted from the second and third.[2]

Subsequent cases showed that the 'connivance' or wilful blindness of a servant placed in charge of licensed premises might equally entail penalties on the employer[3] (just as his own might do). 'I am far from saying', said Blackburn J., 'that, as a matter of law, it is to be inferred that when people connected with horses spend the evening together they will play cards for money, but their particular occupation renders it not improbable.' For the hall porter to leave them to their own devices was to 'suffer' them to gamble: and the innkeeper was involved in the sufferance, on the principle of *Mullins* v. *Collins* (*Redgate* v. *Haynes*). In *Somerset* v. *Hart*[4] there

[1] 35 & 36 Vict. c. 94, s. 16.

[2] See, as to this, *Sherras* v. *de Rutzen*, *infra*.

[3] *Bosley* v. *Davies* (1876) 1 Q. B. D. 84; *Redgate* v. *Haynes* (1876) ibid. 89; *Bond* v. *Evans* (1888) 21 Q. B. D. 250.

[4] (1887) 12 Q. B. D. 360.

was no 'connivance' on the part of the landlord or of anybody responsible, and on this ground it was distinguished in *Bond* v. *Evans*.

These cases were followed in *R.* v. *JJ. of Holland* (*Lincs.*).[1] Permission was inferred from a single occurrence at an inn when the licensee was away, committed with the consent of the person who was left in control. It was intimated, however, that proof that it had been contrary to his wishes or orders might have made a difference. The defendant took no trouble to negative the presumption of permission which Lopes J. seems to think arose from the very facts of his wife's conduct.

In *Crabtree* v. *Hole* (1879) 43 J. P. 799 the proposition was extended beyond connivance to rather slight negligence. The boots ('left in charge of the house' for the night) did not keep an eye on commercial men staying in the hotel. Whether the landlord is bound to have a porter or boots to supervise his guests, or whether, if he does not, he is bound to sit up with them all night himself, does not appear. So *Lee* v. *Taylor* (1913) 77 J. P. 66, when the complaint was properly treated as of a 'trifling nature'.

About 1890, a current of authority in favour of sustaining the principle of *mens rea* obtained: possibly due to the fame of *R.* v. *Tolson* (1889) 23 Q. B. D. 168.

A very important case for our purpose—for it touches on the criminal liability of persons who are carrying out some purpose in common, but are not incorporated[2]—is *Newman* v. *Jones*.[3] A club steward sold liquor to non-members, *contrary to express orders*. It was attempted to fine the permanent trustees of the club (who were *ex officio* members of the managing committee). Mathew

[1] (1882) 46 J. P. 312.

[2] In the particular case, there was a quasi-incorporation by registration as a working men's club under 38 & 39 Vict. c. 60.

[3] (1886) 17 Q. B. D. 132.

and (A. L.) Smith, without deciding whether a relation existed between them and the steward which made them responsible for his acts, held that they could not be criminally responsible for what they had told him not to do. No such express orders had been proved in the other cases. And the strong line which had been taken as to responsibility for the acts or connivance of a servant who is put in control was to this extent departed from. The extreme delicacy of the question which would otherwise have arisen as to the liability of committeemen and trustees may have had an unacknowledged influence on the mind of the Court.

Newman v. *Jones* was not, however, liked, in *Commrs. of Police* v. *Cartman*.[1] A barman had been expressly told not to serve drunken people. He served one, and the innkeeper was adjudged liable. 'It makes no difference that the licensee has given private orders to his manager not to sell to drunken persons: were it otherwise, the object of the section could be entirely defeated.' But Russell and Wright could not overrule Smith and Mathew: the actual statutes were different, but the principle is the same. In fact, the argument for liability is stronger in the older decision. It has also the support of Cave and Charles in *Kearley* v. *Tylor*,[2] where evidence of express instructions to salesmen not to sell certain lard otherwise than in appropriate wrappers was excluded by justices, who (after refusing even to state a case) were directed to admit it. 'This evidence was in my opinion admissible and material,' said Cave. 'Evidence was offered to show that the shop assistant was acting in disobedience to the orders of his masters, and this is clearly admissible,' added Charles. 'There is nothing in the Act which prevents the applicability of the ordinary

[1] [1896] 1 Q. B. 655; 35 & 36 Vict. c. 94, s. 13.
[2] [1891] 65 L. T. 261; 38 & 39 Vict. c. 63, s. 6.

law as regards the criminal liability of a master for his servant to cases under that Act.'

Express instructions, therefore, seemed to confer a certain measure of protection, except where the master was installed in his office under the protection of a public licence.

In *Brown* v. *Foot*,[1] however, Hawkins and Wills considered that warnings to milkmen against dishonest tampering with the milk would not protect the employer; and certainly that the latter was responsible if his servant watered the milk and sold it. In Hawkins's confused judgment, the penalty is imposed in order to make milk-dealers more careful. But it cannot make them more careful, to fine them however careful they have been. Wills takes the fine distinction that the steward in *Newman* v. *Jones* was travelling outside his employment in selling to outsiders at all, whereas here the milkman, in abstracting his master's milk, and selling water instead of it, was not.

The latest deliverance on the effect of express prohibitions is *Coppen* v. *Moore*[2] which was decided by six judges. The charge was one of a verbal false trade-description.[3] Express instructions had been given to salesmen against geographical descriptions, but one of them called a ham a 'Scotch ham'. *Newman* v. *Jones* was not cited, though many cases were. 'Any other conclusion', said Lord Russell, 'would "to a large extent" render the Act ineffective for its avowed purposes.' Only one judgment was delivered, though it had the accession of Jeune, Chitty, Wright, Darling, and Channell. This is, however, slightly to anticipate.

A Metropolitan Act (18 & 19 Vict. c. 120) enables the cost of negligent or accidental damage to public lamps

[1] [1892] 66 L. T. 649; 38 & 39 Vict. c. 63, s. 6.
[2] [1898] 2 Q. B. 300, 306. [3] 50 & 51 Vict. c. 28, s. 2.

to be recovered summarily from the party causing it. A gardener's driver, while on his master's business, accidentally damaged such a lamp opposite the Kensington Town Hall. Field, on the ground that the damage, though not strictly a penalty, could be recovered by summary process directly enforceable by imprisonment, declined to hold the master liable. The argument that servants were 'men of straw' and the liability really civil, fell on deaf ears. Wills considered that even for a careless act of the servant this particular quasi-criminal liability would not fall upon the master.[1]

In a case of nuisance by smoke under the Metropolitan Act, 16 & 17 Vict. c. 128,[2] it was held that personal misconduct was necessary to enable the proprietor of a factory to be convicted. But in this Act the word was not 'allowing' the act, but doing it, and a different section used express words when imposing on owners a penalty when their servants emitted smoke from a steamship. 'It is for the prosecution', says Field, 'in each case to make out clearly that the Legislature has in fact enacted ... that persons shall be criminally responsible for the doing of particular acts', even though they have no *mens rea*.[3] 'It lies on those who assert that the Legislature has so enacted to make it out convincingly by the language of the statute.' [4]

A tobacconist and refreshment-house keeper's wife, in his absence, sold bottles of beer. It was held that the justices of Yorkshire were wrong in convicting him.[5] The

[1] *Harding* v. *Barker* (1889) 53 J. P. 308.

[2] *Chisholm* v. *Doulton* (1889) 22 Q. B. D. 736. Cf. *Willcock* v. *Sand* and *Barnes* v. *Akroyd*, *supra*.

[3] But 'I quite admit that this construction may throw difficulties in the way of securing convictions under the former section, but I must construe the language as I find it': *per* Field J. in *Chisholm* v. *Doulton*, *supra*.

[4] ibid. *per* Cave J., p. 741.

[5] *Allen* v. *Lamb* [1893] 57 J. P. 377.

charge was not one of permitting sale, but of unlicensed selling.

SS. *Opah* loaded a cargo at Hymassi in Greece, and the mate overloaded her. It was held that the owner did not 'allow' this.[1] So that ship-owners are better off than inn-keepers: according to Cave, because the character of the licensee is so important that he cannot be allowed to shift the responsibility which has been publicly committed to him, by appointing a delegate, who may be an unfit person.

The omission of the word 'knowingly', which formed the only substantial argument in point of law in *Mullins* v. *Collins*, was brushed aside in *Sherras* v. *de Rutzen* [1895] 1 Q. B. 918. Though not germane to our immediate purpose, it may be interesting to observe that the result is that, whilst a publican takes the risk of a customer's turning out to be drunk, he does not take the risk of his turning out to be a constable on duty.[2] Wright J.'s invocation of *Lolley's* case is altogether beside the point; for the alleged absence of *mens rea* in that process was due to a mistake of law, which is never supposed to excuse a crime. *Prince's* case, which he also cites, really turned on the immorality of the accused's conduct, which was held to be sufficiently bad to supply a *mens rea*, even if the facts had been such as he erroneously supposed them.

It must now be apparent how very miscellaneous are the cases in which innocence of any intention to do the act complained of is no defence to a criminal charge.

Perhaps the best enumeration of the heterogeneous cases in which innocence has been made criminal by statute is given by Wright J. in *Sherras* v. *De Rutzen*. Such are: (1) Cases of mistake of law (*Lolley's* case).[3] These, we

[1] *Massey* v. *Morriss* [1894] 2 Q. B. 412. Cave and Collins JJ.

[2] Nor does he take the risk of drunken persons coming into and remaining in the house, or of persons becoming drunk there. *Aliter*, if his servants in charge knew of it. *Somerset* v. *Wade* [1894] 1 Q. B. 574.

[3] (1812) R. & R. 237.

have seen, are not really innocent. (2) Cases of tortious or immoral intention (*Prince's* case).[1] These, too, it is singular to style innocent. (3) Cases of nuisance [at any rate where indictment is the only remedy] (*Stephen's* case,[2] *Medley's* case,[3] *Barnes* v. *Akroyd*).[4] (4) Other cases where the remedy is criminal in form only (*Lee* v. *Simpson*).[5] (5) Miscellaneous cases 'not criminal in any real sense, but prohibited in the public interest under a penalty'. The last are susceptible of little or no classification. The judge mentions (besides Licensing Acts)—

(1) Revenue Laws (*A.-G.* v. *Lockwood*[6]: *sed quaere*).
(2) Adulteration Laws (*R.* v. *Woodrow*[7]—innocent possession of adulterated tobacco; *Fitzpatrick* v. *Kelly*[8]—innocent possession of adulterated food; *Roberts* v. *Egerton*[9]—ibid.).
(3) Game Laws (*R.* v. *Marsh*[10]—innocent possession of game by a carrier: *sed quaere*).
(4) Lunacy Laws (*R.* v. *Bishop*[11]—unlicensed reception of lunatics reasonably believed sane).
(5) Poor Laws (*Davies* v. *Harding*, *infra*).

[1] L. R. 2 C. C. R. 154.
[2] (1866) L. R. 1 Q. B. 702.
[3] (1834) 6 C. & P. 292.
[4] (1872) L. R. 7 Q. B. 474.
[5] (1847) 3 C. B. 871 (unconscious dramatic piracy). *Morden* v. *Porter* (1860) 7 C. B., N. S. 641, cited for the same proposition, is really a case like *R.* v. *Prince*, where the defendant is mistaken in point of law. The judgments by no means bear out Wright's suggestion. The further case quoted under this head, of *Hargreaves* v. *Diddams* (1875) L. R. 10 Q. B. 582, is really a case of mistake of law (right to fish).
[6] (1842) 9 M. & W. 378 (innocent possession of liquorice). But the possession in this case was with the clearest knowledge, and cannot be styled (except in a moral sense) innocent. Morally good motive is no excuse for crime.
[7] (1841) 15 M. & W. 404.
[8] (1873) L. R. 8 Q. B. 337.
[9] (1873) ibid. 494.
[10] (1824) 2 B. & C. 717. We have seen above, that this case only decided that the defendant had not proved his innocence.
[11] (1880) 5 Q. B. D. 259.

To these may perhaps be added :—

(6) Army Acts (*O'Brien* v. *McGregor* (1903) 5 F. (Just. Cas.) 74—pawn of regimentals.)

(7) Smoke Abatement Acts (if the main category (3) (nuisance) is restricted to nuisance as a civil wrong cognizable criminally by accident).

It is difficult to say what precisely was in Wright's mind when he classed these acts together as ' not criminal in any real sense, but prohibited in the public interest under a penalty '. Probably it is a *sine qua non* that the penalty should be monetary.[1] The element of public interest is not particularly high in connexion with the Game Laws; and the words importing it are little more than verbiage. Lastly, what is meant by an act ' not being criminal in any real sense ', it is impossible to say. It is difficult to see why it should not be criminal in a real (if not a very serious) sense to serve a drunken man with liquor. And of course it would be a *petitio principii* to say that the master does not do the act and therefore is not a criminal in any real sense. For that would enable us to hold him criminally responsible for the worst crimes of his servants, and still remain within the principle.

The idea seems to be derived from *Davies* v. *Harvey*,[2] where the judges (Blackburn and Lush) rather shrink from saying that one person is to be convicted for another's ' crime ', but may quite properly be convicted of his offence entailing a ' penalty '. But it is impossible to draw the line. Quite trivial offences have been judicially stated to be ' crimes '.

' The Act ', says Crompton, in *Hearne* v. *Garton*,[3] ' does not make this a crime in matter of form only, but it makes it really a crime. The Act [for the protection of the public] says that, for the purpose of preventing accidents,

[1] Cf. per Blackburn and Lush JJ. in *Davies* v. *Harvey, infra.*

[2] (1874) L. R. 9 Q. B. 438, 440.

[3] (1859) 2 E. & E. 66.

a party shall be liable if he sends any oil of vitriol on the railway. That means, in my opinion, if he sends these things intentionally; and I should be very much troubled if any other construction was put upon the words. A party cannot be criminally liable for the act of a third person, and the same rule applies to the construction of a statute making a crime.'

'I am forced to the conclusion', says Field J. in *Chisholm* v. *Doulton* (*supra*), 'that this is not a mere civil proceeding [prosecution for emitting smoke] but that the offence charged against the respondent is a criminal offence.'

In *Davies* v. *Harvey* (1874) L. R. 9 Q. B. 433, the actual facts were that the partner of a cabinet-maker who was a guardian of the poor sold to a relieving officer a bedstead for purposes of parish relief. The co-partner was held liable to the penalties of sect. 77 of 4 & 5 Will. IV, c. 76, for 'supplying for his own profit goods ordered to be given in parochial relief'.[1] This does not follow from *Mullins* v. *Collins*; for, as has been pointed out above, a partner has not the same control over a partner as over a servant. Blackburn's judgment is incoherent on this point; Lush merely reiterates that: 'were it otherwise, it would make a very wide way for evasions of this very salutary enactment'. Yes, but it is for the Legislature to stop the path.

On a review of the whole subject, it will be seen that the law is in a state which it is not too much to call discreditable to English jurisprudence. Vicarious criminal liability is imposed haphazard and with an arbitrary hand. Worse than all, it can seldom be certain whether the penalties of a statute can be safely held to be vicarious or not. It would be much more straightforward and satisfactory if penalties were directly imposed on employers for failure to secure the due provisions of statutes by their servants,

[1] It is curious that Sir H. Poland, who argued against the conviction in *Mullins* v. *Collins*, was instructed to support it in this case.

in cases where this is intended. To make an employer an insurer of his servant's conduct may be to throw an exceedingly heavy liability upon him, altogether beyond what Parliament would ever have intended. And it must be remembered that, even if the results of summary process are not very serious, they involve in the minds of ignorant people a certain amount of discredit: moreover, the defendant is always liable to be arrested on a warrant, and he may be forced to attend from a remote part of the country.

The vicarious liability imposed on parents and others having the control of persons under sixteen by 8 Ed. VII, c. 67, ss. 99, 131, is entirely consonant with the bureaucratic spirit which pervades that enactment. It is remarkable that a generation which has put the powers of the parent in the hands of the schoolmaster, and has simultaneously saddled the parent with increased responsibility, should be exercised as to the reasons for the falling birth-rate. They are ready to hand.

LIST OF AUTHORITIES AND ABBREVIATIONS

[date] A. C. : Law Reports, Appeal Cases (1891 and later).
[date] C. D. : Law Reports, Chancery Division (do.).
[date] K. B., Q. B. : Law Reports, King's Bench Division, Queen's Bench Division (do.).
[date] P. : Law Reports, Probate, Divorce, and Admiralty Division (do.).

A. & E. : Adolphus and Ellis's Reports (*see* Q. B.).
Abrath, G. A. : The Abrath-McMann Case (Sunderland, 1885).
A. C. : Appeal Cases (Law Reports) (previous to 1891).
Aguesseau, H. F. d' : Œuvres (ed. Pardessus, Paris, 1819).
Am. L. R. : American Law Review.
Am. Rep. : American Reports (Albany).
Am. St. Rep. : American State Reports.
Angell & Ames : Corporations.
An. Pract. : Annual Practice (England, Supreme Court).
Argentré, B. d' : Commentarii in Patriae Britonum Leges (Paris, 1628).
Atk. : Atkyns' Reports.

Bac. Abr. : Bacon's Abridgement of the Law.
B. & Ad. : Barnewall and Adolphus' Reports.
B. & Ald. : Barnewall and Alderson's Reports.
B. & C. : Barnewall and Cresswell's Reports.
B. & P. : Bosanquet and Puller's Reports.
B. & S. : Best and Smith's Reports.
Baluzius : Capitularia Regum Francorum (Paris, 1677).
Bankton, Lord : Institute of the Laws of Scotland (Edin., 1751).
Barbour's Reports (Supreme Court, New York).
Barclay, H. : Digest of the Law of Scotland (Edin., 1880).
Barn. : Barnardiston's Reports.
Baty, T. : Britain and Sea Law.
Beav. : Beavan's Reports.
Bell, R. : Dictionary of the Law of Scotland (Edin., 1882).
Bi. : Bingham's Reports.
Bi., N.S. : Bingham's Reports (New Series).
Brownl. & Gold. : Brownlow and Goldesborough's Reports.
Buckland, W. W. : Roman Law of Slavery.
Bun. : Bunbury's Reports.

Cab. & El. : Cababé's and Ellis's Reports.
Camp. : Campbell's Reports (Nisi Prius).
C. & P. : Carrington and Payne's Reports (Nisi Prius).
C. B. : Common Bench Reports.
C. B., N.S. : Common Bench Reports, New Series.
C. C. R. : Reports of Crown Cases Reserved.
C. D. : Law Reports, Chancery Division (previous to 1891).

Ch. Ap. : Law Reports, Chancery Appeals.
C. L. : Common Law Series.
Cl. & F. : Clark and Finelly's Reports.
Clifford : Clifford's Reports (United States, 1st Circuit).
C. M. & R. : Crompton, Meeson and Roscoe's Reports.
C. P. : Law Reports (Common Pleas).
C. P. D. : Law Reports (Common Pleas Division).
Code Civil (France).
Code Commercial Russe (trans. Tchernow).
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Código Civil (España) (Madrid, 1889).
Código Civil (Guatemala) (Guatemala, 1877).
Codigo Civil Portuguez (Lisbon, 1879).
Com. : Comyns' Reports ; Comstock's Reports (New York).
Conn. : Connecticut Reports.
Cowp. : Cowper's Reports.
Cr. & J. : Crompton and Jervis's Reports.
C. tem. Hardwicke : Cases tempore Hardwicke C.
Cumberledge's Reports.
Cunningham's Reports.

D. : Cases in the Court of Session (Dunlop and others).
Dalloz : Jurisprudence Générale.
De G. & J. : De Gex and Jones's Reports.
De G. & Sm. : De Gex and Smale's Reports.
D. N. B. : Dictionary of National Biography.
Doctor and Student (ed. of 1761).
Dow's Reports.
Drew. : Drewry's Reports.

E. & B., El. & Bl. : Ellis and Blackburn's Reports.
E. & E., El. & El. : Ellis and Ellis's Reports.
E. & I. Ap. : Law Reports, English and Irish Appeals.
East's Reports.
E. B. & E. : Ellis, Blackburn, and Ellis's Reports.
Erskine, Lord : Principles of the Law of Scotland (ed. Muir and Guthrie, Edin., 1874).
Esp. : Espinasse's Reports (Nisi Prius).
Exch., Ex. : Exchequer Reports ; Law Reports (Exchequer).
Ex. D. : Law Reports, Exchequer Division.

F. : Cases in the Court of Session (Fraser and others).
F. C. : Faculty Cases.
Fed. Rep. : Federal Reporter (Amer.).
Ff. : The Pandects of Justinian.
Fitzg. : Fitzgibbon's Reports.
Fortes. : Forteseue's Reports.
Fraser, Lord : Law of Master and Servant.
Fuentes, A. & De Lama, A. : Codigo Civil del Peru (Lima, 1869).

Georgia Reports.
Girard, F. : Manuel de Droit Romain.
Gray : Gray's Reports (Massachusetts).
Grasserie, R. de la : Code Civil Péruvien (Paris, 1896).

H. & C. : Hurlstone and Coltman's Reports.
H. & N. : Hurlstone and Norman's Reports.
Har. & Gill : Harris and Gill's Reports (Maryland).
Harv. L. R. : Harvard Law Review.
H. Bl. : Henry Blackstone's Reports.
Higgins, A. Pearce : Employers' Liability.
Hilliard, Francis: The Law of Torts or Private Wrongs (Boston, 1859).
Hill's Reports (New York).
H. L. C. : House of Lords Cases.
Holt : Cases tem. Holt (Farresley).
Holt N. P. : Holt's Nisi Prius Reports.
How. : Howard's Reports (New York Appeals).
How. St. Tr. : Howard's State Trials.
Hume's Dec. : Hume's Decisions.

Ill. : Illinois Reports.
Inst. : Institutes of Justinian.
Io. : Iowa Reports.
I. R. : Irish Reports.

Japanese Civil Code of 1897 (ed. Becker).
Japanese Civil Code of 1897 (translated by Gubbins).
J. G. : Dalloz, Jurisprudence Générale.
Journal du Palais.
J. P. : Justice of the Peace Reports.
Just. Cas. : Justiciary Cases (Scot.).

Kerly : History of the Court of Chancery.
Ky. : Kentucky Reports.
Kyd : Treatise on the Law of Corporations (Lond., 1793).

Law Magazine and Review.
Ld. Raym. : Lord Raymond's Reports.
Leon. : Leonard's Reports.
Lev. : Levinz's Reports.
Little : Treatise of the Subpoena.
L. J. : Law Journal.
L. J. C. : Law Journal Reports (Chancery).
L. J. M. C. : Law Journal Reports (Magistrates' Cases).
L. J. Q. B. : Law Journal Reports (Queen's Bench).
L. R. A. : Legal Reports Annotated.
L. R. I. : Law Reports, Ireland.
L. R. : The Law Reports.
L. T. : Law Times Reports.
L. T. N. S. : Law Times Reports (New Series).
Lutwyche's Reports.

M. : Cases in the Court of Session (Macpherson and others).
Macl. & Rob. : Maclean and Robinson's Reports.
MacQ. : MacQueen's Reports.
M. & G. : Manning and Granger's Reports.
M. & S. : Maule and Selwyn's Reports.
Mass. : Massachusetts Reports (*and see* Gray).
M. & W. : Meeson and Welsby's Reports.

Meyer: Esprit des Institutions Judiciaires.
Mich.: Michigan Reports.
Mod.: Modern Reports.
Moo. & Mal.: Moody and Malkin's Reports (Nisi Prius).
Moo. & Rob.: Moody and Robinson's Reports (Nisi Prius).
Moore's Reports.
Mor.: Morison's Dictionary of Decisions (Scot.).
Mos. & Rom. ll. Collatio: Mosaïcarum et Romanarum Legum Collatio.
Moyle: Institutes of Justinian.
Murr.: Murray's Reports.

N. & P.: Neville and Perry's Reports.
N. B.: New Brunswick Reports.
Norway: Act of 20 July 1893.
N. R.: New Reports (Bosanquet and Puller).
N. Y.: New York; New York Court of Appeals Reports.

O.: Ohio Reports; Order.
O. St.: Ohio State Reports.

Parl. Papers: Parliamentary Papers.
P. C.: Privy Council; Law Reports (Privy Council).
Penn. St., Penn.: Pennsylvania State Reports.
P. F. Smith: P. F. Smith's Reports, cited 91 Penn. 256.
Pollock and Maitland: History of English Law before the time of Edward I.
Pollock, Sir F.: Essays in Jurisprudence and Ethics.
,, ,, : The Law of Torts.
Poph.: Popham's Reports.
Pothier, R. J.: Traité des Obliga ions (Œuvres, Paris, 1835).
,, ,, : Pandectae Justinianeae.

Q. B.: Reports of Cases in the Queen's Bench (*see* Adolphus and Ellis).
Q. B. D.: Law Reports (Queen's Bench Division) (previous to 1891).
Quarterly Review.

R.: Cases in the Court of Session (Rettie and others).
R. I.: Rhode Island Reports.
Rolle's Abridgement of the Laws of England.
Rossel, V.: Code Civil et Code des Obligations (Lausanne, n. d.).
R. S. C.: Rules of the Supreme Court (England).

S.: Cases in the Court of Session (Shaw and others).
Salk.: Salkeld's Reports.
S. & D.: Law Reports, House of Lords Cases (Scotch and Divorce).
(date) S. C.: Session Cases (Supreme Court of Scotland).
S. C.: South Carolina Reports.
Sc. Ap.: Law Reports, Scotch Appeal Cases.
Schuster, E.: Principles of German Law.
Sc. L. R.: Scottish Law Reports.
Sc. L. T.: Scots Law Times (Reports *or* Notes of Cases).
Select Committee on Employers' Liability, 1876: Report.
Serg. & R.: Sergeant and Rawle's Reports (Pennsylvania).
Serpillon: Code Criminel.
Shaw: Shaw's Appeal Cases.

Smith : Law of Master and Servant (Amer.).
Stair, Viscount : Institutions of the Law of Scotland.
Story, J. : Equity Jurisprudence (ed. Grigsby, London, 1892).
Stra. : Strange's Reports.

Taunt. : Taunton's Reports.
Thouller : Droit civil français.
T. L. R. : Times Law Reports.
T. R. : Term Reports.

Ulpian : Ad Edictum.

Vent. : Ventris's Reports.
Vern. : Vernon's Reports.

W. Bl. : Sir Wm. Blackstone's Reports.
Wendell's Reports.
Westminster Review.
Whart. : Wharton's Reports (Pennsylvania).
Wils. : Wilson's Reports.
Wright, Sir R. A. : Law of Principal and Agent.
W. R. : Weekly Reporter.

Y. B. : Year Books.

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[*Scots cases are usually cited by the first proper name only.*]

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